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JAMES D. MAHER,
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No. 45

Supreme Court of the United States

DUPLEX PRINTING PRESS CO.,

Appellant.

against

EMIL J. DEERING, etc., *et als.*,

Appellees.

BRIEF FOR APPELLANT.

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Counsel for Appellant.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

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Supreme Court of the United States

DUPLEX PRINTING PRESS CO., Appellant, against EMIL J. DEERING, etc., *et al.*, Appellees.	No. 164.

BRIEF FOR APPELLANT.

The complainant appeals from a final decree of dismissal, which was affirmed by the Circuit Court of Appeals for the Second Circuit. The action is for an injunction and damages on account of the acts done by the defendants and others in furtherance of a conspiracy to restrain, injure and destroy the complainant's good-will, trade and business.

HISTORY OF THE CASE.

A preliminary injunction was issued at the time of the commencement of the action in April, 1914. After final trial in May, 1917, during which the defendants offered no evidence, a decree of dismissal was entered (p. 177). The complainant prosecuted an appeal to the Circuit Court of Appeals, with the result that three different opinions were rendered

(pp. 191-221), each holding that the case presented a secondary boycott identical in principle with that in the *Hatters'* case, but two judges holding that the Clayton Act of October 15, 1914, had legalized the secondary boycott and repealed the doctrine of the *Danbury Hatters'* case.

Summary of Evidence.

The facts are undisputed as defendants offered no evidence.

Complainant is a Michigan corporation engaged in the business of manufacturing printing presses at its factory in Battle Creek, Michigan. It employs about 200 machinists at the work of manufacturing printing presses in its Battle Creek factory in addition to office employees, traveling salesmen and expert machinists or road men, who supervise the erection of the presses for the complainant's customers at their various places of business. Complainant has always maintained the open shop policy both in connection with its business in Battle Creek and in supervising the erection of presses (fols. 367, 386). Its presses are sold throughout the United States and in foreign countries (fol. 366), and while it operates ten hours a day when busy, it usually runs eight hours in the winter time (fol. 418). Special emphasis is laid on the manufacture of presses for metropolitan newspapers which vary in weight from 10,000 pounds to 100,000 pounds, requiring from one to four railroad cars to transport them (fol. 367) and furnishing many dray loads when carted from the freight yards to the buildings where they are to be used. These presses being of a peculiar manufacture and made under special patents, the

ordinary mechanic or pressman is not competent to erect or operate them except under supervision and instruction of someone usually employed by the complainant who is familiar with their structure and operation (fols. 368-373). At the time of the commencement of this suit these presses were being installed by customers under complainant's supervision in several places throughout the Middle West and through the United States (fol. 374).

The complainant's presses are sold like ordinary commodities, the customer employing the draymen and the erectors for their hauling and installation.

The contracts covering the sale of the presses (Exhibit 5, fols. 440-449) provide in effect that the purchaser furnish "cartage at destination and to furnish *all necessary help for moving and setting up said machinery*," and the complainant agrees to send a competent man to superintend the erection and instruct a pressman (Exhibit 5). The testimony, as to the practice, is the same, showing that the customer employs the truckman and the labor for the erection (fols. 367, 413, 268, 270, 259). Neither did the complainant's representative operate the machine, but simply instructed a pressman (fols. 218-223, 236-238). Except for the supervising erector and instructor, it is admitted that these presses are sold and delivered as a completed product like any other commodity and that 80 per cent. of the sales are made to customers outside of the State of Michigan, orders being subject to acceptance at home office, and deliveries being made by common carriers through the channels of interstate commerce (Par. 4, Complaint—admitted, fols.

14-16). All strikes of draymen, erectors or operators to which we will refer are sympathetic strikes against customers and not strikes of complainant's employees.

Defendants are officers and members of the International Association of Machinists, an unincorporated association having over 73,000 members, who are distributed in about 850 locals throughout the United States and Canada (fols. 106-107). The International Association is also divided into districts, of which District 15 in New York City is one (fol. 107). The members of the Machinists' Union in New York City are also affiliated with the Building Trades Council, which is composed of some thirty different building trades with a membership of over 75,000 (admitted allegations of Par. 5 of Complaint, fol. 20). This body issued a notice that in order to avoid complications

> "none but members of the International Association of Machinists be employed in the building, assembling, erecting, dismantling, or repairing of machinery" (fols. 166-167).

The International Association publishes a Machinists' Monthly Journal, which is circulated through the local branches and on newsstands (fol. 108) and contained reports from time to time on the activities of the International Association of Machinists against the complainant.

The trouble between the parties began in 1910. At that time one of the complainant's presses was being erected for the *New York World*, and defendant Keppler, Vice-President of the International Association of Machinists, with Mr. Edwards, of the Pressmen's Union, and one other, called upon Mr. Stone, the principal officer of the complainant, at

a New York hotel (fol. 375). Mr. Keppler stated that he had been informed at Washington, the headquarters of the International Union, that this non-union press was being erected and he came to advise that they would not allow its erection to proceed because the press had been constructed in a shop that was not unionized (fol. 376). He advised that "he would have to call off the men" (fol. 377), which would involve a great deal of loss and inconvenience (fol. 378), but finally stated he would "*allow and permit* the men to finish the erection of the machine" (fol. 409), so that the work was concluded (fol. 379).

About a year after the installation of the *World* press the complainant sold a press to the *San Francisco Sun* (fol. 380) and defendant Keppler told Mr. Stone that they had received a telegram from the union in San Francisco asking "whether they should allow it to be erected" (fol. 380). During all this time Keppler insisted that the concern should unionize (fols. 380-381) and on this occasion sought to enforce his argument by saying that unionization would avoid these difficulties (fol. 381). Mr. Stone agreed that they would employ union men where convenient to erect the presses (fol. 382). This agreement referred to the men employed by the customers and meant they would influence their customers. This was the complainant's policy from that time on and as a result of this agreement the San Francisco press was erected without difficulty (fol. 383), and no trouble arose thereafter until April, 1913. In April, 1913, the defendants threatened to tie up the National Exhibition of printing press machinery at the Grand Central Palace in New York if the complainant was allowed to display its wares (fols. 323-

324), and this difficulty was only settled because the defendants believed in some way that complainant had agreed to unionize (fol. 313). We will say more of this hereafter, but point out these early attacks which antedated a small strike at the complainant's Battle Creek factory in August, 1913, in order to show that even before the strike the defendants had in mind a comprehensive scheme to cut off the sale and distribution of complainant's products in other states through strikes against customers. The small strike which followed was but an incident of this illegal scheme to cut off interstate trade and protect the union shops from open shop competition, as in the *Hatters'* case (*Lawlor v. Loewe*, 187 Fed., 522, C. C. A.).

In June, 1913, the defendants authorized a strike in the Battle Creek factory (fols. 113-111) and on August 22nd complainant, without knowledge of this proposed strike, laid off some men on account of light work (fol. 386). The defendants claimed discrimination against union men, but no discrimination was practised (fol. 386). The authorized strike was then ordered on August 27, 1913 (fol. 146), but in spite of picketing defendants could only get some eleven factory men and three road men to quit (fol. 387).

It is useless for the defendants to claim that the attack was made on the complainant because of belief in alleged discrimination in discharging some of its men on August 22nd, 1913. Attacks on complainant's trade had already begun. Two months before this alleged act of discrimination the defendants had determined upon a strike. Mr. Keppler himself reports that:

> "As the General Executive Board during its session in June this year had sanctioned a strike at the Duplex Printing Press shop and other ten-hour shops in the printing machinery industry, there was nothing else to do but to carry out their instructions and therefore wired our local organizer, Brother Thompson, who was on the ground, to declare a strike, which was done August 27" (fols. 113-114; *Journ.*, Oct., 1913).

On August 22nd Deering drafted and mailed to the complainant a letter (Exhibit 7, fols. 455-471, 112) in which he stated that the General Board had instructed him "to prepare for action," and in the *Machinists' Journal* for October, 1913, he states:

> "I regret to say, however, that just about the time this letter reached the Duplex Printing Press Company, word was received from Battle Creek that eleven of our members had been discharged, which was closely followed by eight more being let go, discrimination being alleged" (fol. 113).

It is, therefore, evident that the strike was authorized in June and that Keppler proceeded to issue final notice, all before the complainant dismissed some employees because of light work. The alleged discrimination was not, therefore, the cause of the strike. Keppler thereupon announced "that this fight will undoubtedly be a bitter one" (fol. 115). When the strike failed the boycott or the attack upon the complainant's trade and commerce was continued, but with more persistence and effect than before. In the *Journal* for October, 1914, Mr. Keppler, vice-president of the union, reports:

> "As the pressmen and printers' internationals have signified their willingness to as-

> sist wherever possible, and with our own members and other metal trades doing their part, there is no reason why we cannot in time bring this company to the realization," etc.
>
> "Letters have also been sent to our organizers, business agents, and all interested parties, urging them to be on the lookout for presses coming into their locality from the Duplex Company" (fols. 115-116).

On October 10th, 1913, defendant Keppler sent out a circular signed by himself and President Johnson (fols. 143-148) addressed promiscuously to "Dear Sirs and Brothers" which speaks of the attitude of the complainant toward the eight-hour movement, falsely represents that it was "systematically discriminating against organized labor from time to time" and declares that "The International Association of Machinists was finally compelled to declare a strike against this Company August 27th." The circular then continues:

> "Further, as this Company's Presses are shipped to all parts of the Country, generally in contact with Union men, and as our Road men are also on the strike we urge you to bring this to the attention of Allied Printing Trades in your locality, thus acquainting them of this Company's most unfair attitude towards Organized Labor, and if possible influence your Employer not to have such Machinery installed by unfair men, or that they will not let any more contracts to the Duplex P. P. Co., until Organized Labor is fairly dealt by.
>
> We would further urge you or your members to see to it that when Machinists install or repair any Printing Machinery in your Establishment, that they carry cards in

> the I. A. of M., as there are some other firms who have not as yet agreed to Eight (8) Hours, and this will have a tendency in bringing them to terms."

In the November, 1913, *Journal* we have this report:

> "The Grand Lodge endorsed Battle Creek's letter of appeal for finances and since has sent out letters to all allied printing trades Councils, printers, pressmen, photo engravers and stereotypers' locals urging their moral assistance to bring the strike at the Duplex P. P. Co. to a successful termination. Further, to say to our general members that our road men are also on strike and it is necessary to acquaint all when coming in contact with such machinery, that no member of the I. A. of M. is employed at the Battle Creek shop, nor has any machinist of the I. A. of M. a card or right to install such work" (fol. 118).

In the December *Journal* for 1913, defendant Keppler reports:

> "Conference was also held in Chicago with the printing pressmen relative to Battle Creek Duplex Printing Press eight-hour strike, also with other printing tradesmen. They have been in touch with this company, all of which seemed to be of great benefit to us," etc. (fols. 119-120).

In the *Journal* for February, 1914, defendant Keppler reports concerning the complainant:

> "This company has admitted that much harm has been done them on the outside, with many publishers having cancelled orders, and their machinery not being erected, so I

> would again suggest that no matter what our next conference may bring forth, for all to get in touch with the local printing tradesmen," etc. (fol. 122).

In the *Journal* for March, 1914, defendant Keppler reports on a telegram from the complainant expressing a willingness to adopt the eight hours, and defendant Keppler states that this was not sufficient unless the questions of overtime rates and many other matters were settled. He then adds:

> "I would therefore again urge our people to appoint a committee in their locality and put facts before the Allied Printing Trades that we are still on strike at the Duplex Printing Press Co. of Battle Creek, Mich.," etc. (fol. 125).

In line with his report in the March *Journal*, and his exhortations to members, defendant Keppler issued another circular against the complainant, which reiterates again the action of those conspirators at their St. Louis conference (fols. 150-154). The essential part of the circular is as follows:

> "INTERNATIONAL ASSOCIATION OF MACHINISTS
>
> District Lodge No. 15
>
> April 4, 1914.
>
> To the G. E. B.; Vice Presidents; Business Agents; and Organizers.
>
> EIGHT HOURS THAT'S ALL.
>
> Greeting:
>
> During the recent St. Louis Conference the Committee on Printing and Paper Mak-

ing Machinery reported on that Industry, *and a transcript of that report is here reproduced*; as follows:

> 'That all representatives of the I. A. M., when organizing in various localities, shall endeavor to attend the local Allied Printing Trades Council meetings from time to time, urging the members of the Allied Printing Trades to demand the I. A. of M. due books of Machinists, who may be installing or repairing machinery. Also, to make it known that our members are on strike for eight (8) hours, against the Duplex Printing Press Co. of Battle Creek, Mich., and the Oswego Machine Co. of Oswego, N. Y.—the latter are builders of paper cutting machinery—*requesting them to assist wherever possible, to prevent the installation of this unfair machinery, and also, persuade if possible, fair employers from letting further contracts for machinery to either of these firms.*'

Copies of the enclosed letter have also been mailed to all Allied Printing Trades Councils, and locals, and have produced results.

At this time, it is most essential to again acquaint all Organized Labor, with the unfair attitude of the Duplex Printing Press Co. and the Oswego Machine Co. The Duplex Co. has finally put their plant on an eight (8) hour day basis, but they still refuse to reinstate our striking members, or to adjust the wage scale.

We feel that if our representatives will attend the meetings of the Allied Printing Trades Councils at this time, placing the facts before them, and urging them to comply, as nearly as possible with the contents set forth in the enclosed circular, that a settlement will be reached in the near future."

In the *Journal* for May, 1914, defendant Keppler reports:

> "Letters have also been sent to all of our representatives urging them to acquaint allied printing trades of the unfair methods of the Duplex Printing Press Co. of Battle Creek, Mich., and the Oswego Machine Co. of Oswego, N. Y., as our members are on strike there for eight hours, so it would not be amiss at this time to also request all of our members to be on the lookout for such machinery coming into their locality" (fols. 127-128).

In the *Journal* for July, 1914, defendant Keppler reports:

> "Conventions of printing pressmen, stereotypers and book binders held in Rogersville, Tenn., Newark, N. J., and Denver, Colo., respectively, are being looked after, and the Battle Creek Duplex P. P. Co. strike will be taken care of" (fol. 130).

In the *Journal* for August, 1914, defendant Keppler reports:

> "At the Pressmen's Convention which Organizer Davison attended, reports show progress in extending our working agreement and passing resolutions relative to the Duplex P. P. Co. strike in Battle Creek, Mich. The same may be said of the Bookbinders and Stereotypers' Conventions" (fol. 131).

The nature of these resolutions passed at the conventions of the pressmen, stereotypers and bookbinders, and the co-operation between the defendant and those organizations, is shown by the resolutions

passed at the 26th Annual Convention of the Pressmen, held in Rogersville, Tenn., in June, 1914 (fols. 191-194). This is one of the conventions referred to by defendant Keppler in the foregoing reports from July and August *Journals*, and the resolutions passed at this convention contain the following:

> "Whereas, The Duplex Printing Press Company, of Battle Creek, Mich., have placed on the market a press known as the Duplex tubular plate printing press for newspapers of twelve pages or under; and
>
> Whereas, Through their agents they have misrepresented their press to the publishers whereby they claim their press can be operated with less men than the union contracts with the American publishers' association call for, and
>
> Whereas, They have been unfair to their machinists and where they locked out eleven machinists on August 20, 1913, and later, on 22nd of August, without any cause locked out seven more officers of union and committee, and have been invariably unfair to union labor wherever employed; therefore be it
>
> Resolved, That the International Printing Pressmen and Assistants' Union in their Twenty-Sixth Annual Convention assembled, do hereby disapprove and condemn their action in misrepresenting their presses to prospective buyers, and which has been a detriment to our local unions in their working conditions throughout the country.
>
> Whereas, They continue to misrepresent their press, be it further
>
> Resolved, That the International Printing Pressmen and Assistants' Union in Twenty-Sixth Annual Convention assembled, adopt

these resolutions and a copy sent to the Duplex Printing Press Company, of Battle Creek, Mich., and a copy be spread on the minutes of this convention and a copy sent to the American Pressmen for publication.

WEB PRESSMEN'S UNION No. 20,
CINCINNATI, OHIO.

Per W. A. McKay, Delegate."

This resolution was referred to committee on resolutions and passed on the fifth day of the convention.

Another resolution was also passed at the same convention (fols. 195-200), as follows:

"Whereas, The International Association of Machinists is affiliated with the A. F. of L., also with the building, metal, railroad and label departments thereof, and has so changed its laws to bring about closer affiliation of workmen and women engaged in any great industry, to the end that joint action may be brought if necessary; and

Whereas, Machinists, apprentices and helpers, numbering many thousands engaged in the making, erecting, installing, dismantling or repairing of machinery of all descriptions used by printing trades, are organizing this industry for the establishment of the eight (8) hour day, with many employers now operating on the eight (8) hour basis, and to further assist, if necessary, those with whom we come in contact in our daily labor in various printing establishments, and

Whereas, The general trend of labor organizations today is undoubtedly toward

bringing about closer affiliation of kindred trades employed in a similar industry, so grievances may be more readily adjusted by those familiar with same, with joint action brought about when being oppressed by unscrupulous employers; therefore be it

Resolved, That we, the International Association of Machinists, urge the delegates of the Printing Pressmen and Assistants' Union in convention assembled to endorse this resolution, to the end that we may bring about a condition whereby we may at all times act in unison for the protection of those we represent. Be it further

Resolved, That we pledge our moral support to those now on strike for eight (8) hours against the Duplex Printing Press Company, at Battle Creek, Mich., to the end that we do intend, wherever possible to protect the fair employer, but *will prevent if possible, the installation of presses by scab labor, and also use our influence to prevent the placing of orders for presses manufactured under unfair conditions;* and further, that we continue to demand I. A. of M. cards where machinery is being installed or repaired, and that these resolutions be given as much publicity as possible among printing pressmen and printing trades.

The committee recommends concurrence.

President Berry—The International Printing Pressmen and Assistants' Union does not in the adoption of this communication intend to precipitate or participate in any manner whatsoever with the I. A. of M. to boycott or attempt to discriminate against any fair industry. We simply take this position for the purpose of protecting the rights and interests as established by law for the Printing Trades Unions of North America. I make this statement for the rec-

ords and for the advice of the convention. The chair entertains the proposition on the ground that it extends to that point, so that there may be no misunderstanding in the future in the event of the *Duplex Company* attempting to misconstrue the position of the I. P. P. and A. U.

Delegate Mooney—It is giving our moral support to the International Association of Machinists all over the country.

The recommendation of the committee was adopted."

This is the same Mr. Berry that had been writing the complainant (Exhibit 6, fols. 451-454), and the same union which had been working with the machinists against the complainant.

Defendants Neyland and Deering, as well as Vice-President Jennings and Stilgenbauer, went together to the St. Louis conference of the general officers of the International Association of Machinists, which was held in March, 1914 (fol. 126). Their presence at each session of the convention itself is recorded, and there were also present, defendants William Bramley, and J. J. Keppler, who submitted reports, and M. J. Carney, and H. V. Riley, as well as over fifty others (fol. 158).

On March 12th the St. Louis conference of general officers enacted resolutions claiming jurisdiction over the

"making, installing, erecting, maintaining, dismantling, assembling, repairing parts thereof or tools therefor, of all printing and paper-making machinery" (fol. 161).

"Further, that all I. A. of M. representatives when organizing in various localities shall endeavor to attend local Allied Print-

passed at the 26th Annual Convention of the Pressmen, held in Rogersville, Tenn., in June, 1914 (fols. 191-194). This is one of the conventions referred to by defendant Keppler in the foregoing reports from July and August *Journals*, and the resolutions passed at this convention contain the following:

> "Whereas, The Duplex Printing Press Company, of Battle Creek, Mich., have placed on the market a press known as the Duplex tubular plate printing press for newspapers of twelve pages or under; and
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> Whereas, Through their agents they have misrepresented their press to the publishers whereby they claim their press can be operated with less men than the union contracts with the American publishers' association call for, and
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> Whereas, They have been unfair to their machinists and where they locked out eleven machinists on August 20, 1913, and later, on 22nd of August, without any cause locked out seven more officers of union and committee, and have been invariably unfair to union labor wherever employed; therefore be it
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> Resolved, That the International Printing Pressmen and Assistants' Union in their Twenty-Sixth Annual Convention assembled, do hereby disapprove and condemn their action in misrepresenting their presses to prospective buyers, and which has been a detriment to our local unions in their working conditions throughout the country.
>
> Whereas, They continue to misrepresent their press, be it further
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> Resolved, That the International Printing Pressmen and Assistants' Union in Twenty-Sixth Annual Convention assembled, adopt

these resolutions and a copy sent to the Duplex Printing Press Company, of Battle Creek, Mich., and a copy be spread on the minutes of this convention and a copy sent to the American Pressmen for publication.

WEB PRESSMEN'S UNION No. 29,
CINCINNATI, OHIO.

Per W. A. McKay, Delegate."

This resolution was referred to committee on resolutions and passed on the fifth day of the convention.

Another resolution was also passed at the same convention (fols. 195-200), as follows:

"Whereas, The International Association of Machinists is affiliated with the A. F. of L., also with the building, metal, railroad and label departments thereof, and has so changed its laws to bring about closer affiliation of workmen and women engaged in any great industry, to the end that joint action may be brought if necessary; and

Whereas, Machinists, apprentices and helpers, numbering many thousands engaged in the making, erecting, installing, dismantling or repairing of machinery of all descriptions used by printing trades, are organizing this industry for the establishment of the eight (8) hour day, with many employers now operating on the eight (8) hour basis, and to further assist, if necessary, those with whom we come in contact in our daily labor in various printing establishments, and

Whereas, The general trend of labor organizations today is undoubtedly toward

bringing about closer affiliation of kindred trades employed in a similar industry, so grievances may be more readily adjusted by those familiar with same, with joint action brought about when being oppressed by unscrupulous employers; therefore be it

Resolved, That we, the International Association of Machinists, urge the delegates of the Printing Pressmen and Assistants' Union in convention assembled to endorse this resolution, to the end that we may bring about a condition whereby we may at all times act in unison for the protection of those we represent. Be it further

Resolved, That we pledge our moral support to those now on strike for eight (8) hours against the Duplex Printing Press Company, at Battle Creek, Mich., to the end that we do intend, wherever possible to protect the fair employer, but *will prevent if possible, the installation of presses by scab labor, and also use our influence to prevent the placing of orders for presses manufactured under unfair conditions;* and further, that we continue to demand I. A. of M. cards where machinery is being installed or repaired, and that these resolutions be given as much publicity as possible among printing pressmen and printing trades.

The committee recommends concurrence.

President Berry—The International Printing Pressmen and Assistants' Union does not in the adoption of this communication intend to precipitate or participate in any manner whatsoever with the I. A. of M. to boycott or attempt to discriminate against any fair industry. We simply take this position for the purpose of protecting the rights and interests as established by law for the Printing Trades Unions of North America. I make this statement for the rec-

> ords and for the advice of the convention. The chair entertains the proposition on the ground that it extends to that point, so that there may be no misunderstanding in the future in the event of the *Duplex Company* attempting to misconstrue the position of the I. P. P. and A. U.
>
> *Delegate Mooney*—It is giving our moral support to the International Association of Machinists all over the country.
>
> The recommendation of the committee was adopted."

This is the same Mr. Berry that had been writing the complainant (Exhibit 6, fols. 451-454), and the same union which had been working with the machinists against the complainant.

Defendants Neyland and Deering, as well as Vice-President Jennings and Stilgenbauer, went together to the St. Louis conference of the general officers of the International Association of Machinists, which was held in March, 1914 (fol. 126). Their presence at each session of the convention itself is recorded, and there were also present, defendants William Bramley, and J. J. Keppler, who submitted reports, and M. J. Carney, and H. V. Riley, as well as over fifty others (fol. 158).

On March 12th the St. Louis conference of general officers enacted resolutions claiming jurisdiction over the

> "making, installing, erecting, maintaining, dismantling, assembling, repairing parts thereof or tools therefor, of all printing and paper-making machinery" (fol. 161).
>
> "Further, that all I. A. of M. representatives when organizing in various localities shall endeavor to attend local Allied Print-

> ing Trades Council meetings from time to time, urging that members of allied printing trades demand the I. A. of M. due books of machinists who may be installing or repairing machinery; also make it known that our members are on strike for eight hours against the Duplex Printing Press Co. of Battle Creek, Mich., and the Oswego Machine Co. of Oswego, N. Y., builders of paper-cutting machinery, requesting them to assist wherever possible *to prevent installation of this unfair machinery*, and also persuade, if possible, fair employers from letting further contracts for machinery to any of these firms" (fols. 163-164).

The general determination to control construction for the purpose of controlling commerce and unionizing factories appears again and again.

Defendant Keppler refers to the necessity of organizing all of the construction work in order *to control the output of the factories*, "and enable us at most all times to assist in settling our grievances in the shop by our construction machinists refusing to handle or erect unfair machinery" (fol. 177).

On page 29 he proceeds further and says:

> "Can you imagine the contractor or architect allowing their building tied up any length of time without the proper machinery being installed, or the employer, who has already paid for his labor in making the machinery, closing his shop simply because our men would refuse to erect his unfair machinery until he dealt fairly with his shop men? We should also remember that if one job should get away there are many other buildings going up, but if once a machine shop turns scab, it's usually a scab monument a long time unless we can bring some

> pressure to bear on the outside. The trouble has been we have depended on others helping us too much—we must learn to help ourselves. It is very true that all industries will not be directly benefited by getting control of our output, or perhaps there are localities where no such work is being manufactured, but look around your city and see if there is not some such work being installed from time to time that should be done by our members" (fols. 179-180).

Again on March 14th, at this same conference, defendant Keppler points out "the fundamental principles for which our association stands, namely, employment of our members, jurisdiction of work * * * control of our output," etc. (fol. 170), and he further states that the agreement with the Goss Printing Press Company "was only brought about after we were able to prevent installation of their presses on the outside" (fol. 172).

Toward the end of the day of this session of March 14th a formal report is submitted which includes the sub-head of "Printing Presses," and says:

> "In no other way, in the opinion of the writer, than by a strenuous campaign to control the erection of the product of all machine shops throughout our jurisdiction can this situation be changed. It is near time that we realized that the employer can surround himself with enough protection in times of strike to manufacture his product (fol. 185). Would it not be better to fight for the control of the erection of the product of these shops? We have nothing to lose and everything to gain, and we can show that in every case *where we have gained absolute control of the erection there has been no*

> *trouble in organizing and keeping organized the shops where the product was manufactured.* It is a natural conclusion that if the manufacturer knows his product is to be erected by union machinists, he will be careful about having any question arise in the shop that may stop the erection on the job, as it must be put into operation before he gets his pay for his product" (fol. 188).

The evidence contains repeated statements of the defendants made in connection with their specific acts of interference, which we will review, all of which show the comprehensive plan not to allow any workmen to handle, haul, operate or repair a Duplex press, no matter who employed them. It is a kind of bill of attainder passed against a certain species of property, and resulting in strikes among employees of customers, contractors and draymen against whom there is no grievance. It is intended by this plan to make Duplex presses useless, unsalable and unmarketable.

National Exposition Company.

The National Exposition Company, of which Mr. Harry Cochrane was president, held expositions of printing machinery annually in New York City, at the Grand Central Palace, coincident with the conventions of the American Newspaper Publishers' Association and the Associated Press, with a view to bringing the buyers and sellers of presses together in one building at the same time where they could look over the different devices (fols. 314-315). These expositions are based upon these conventions of the business men interested in printing presses, and the first one was held in April, 1913, with 125 exhibitors (fol. 315). The exhibitors employ their

own labor to erect the booths and install their machinery (fol. 316). The Exposition Company was friendly to organized labor and even had defendant Keppler on its advisory staff (fols. 333-334). In December, 1912, complainant entered into a written contract with the National Exposition Company, in which the complainant agreed to exhibit at the exposition to be held in April, 1913 (fol. 316).

The opportunity to exhibit was of great importance, apparently carrying with it large orders, and defendants themselves realized this, for Deering said: "Mr. Stone would get a lot of orders out of this show in New York, enough to keep the factory going for a long time, and he did not want to give him an opportunity to get them unless he unionized the shop" (fol. 332). They, therefore, combined to prevent the advertising or exhibiting of complainant's goods to the public, so that the public would remain ignorant of their desirability.

In April Deering called at Cochrane's office relative to the employment of union labor, and Cochrane told him that the exhibitors were free to employ whom they saw fit and that the Exposition Company had no control over the matter (fol. 317). Deering said there were some exhibitors who did not employ union labor (fol. 318) and that union labor would have to be employed by the various exhibitors; that a strike would be called if union men were not employed by the various exhibitors (fol. 318). As a result of this conversation Cochrane informed the various exhibitors that "they would have to employ union labor in order to avoid trouble" (fol. 318). Just before this exposition of April, 1913, actually opened Deering and Neyland again called on Cochrane when trucks

of exhibits were already arriving (fols. 318-319), and trouble arose concerning the Mergenthaler Company, one of the exhibitors, for employing men who were not members of the Machinists' Union, but were members of Typographical Union (fol. 319). Neyland and Deering said "that members of the Riggers' Union and the International Union would have to be employed or else there would not be anything else unloaded and no machines erected" (fol. 319). The Mergenthaler Company said the machinists were not qualified to do their work, and finally Deering said: "You will have to hire our men whether they can or not or else there will not anything else more be unloaded or there will not be any machinery put up" (fol. 320). Finally the Mergenthaler Company and other exhibitors employed the Machinists' men, who stood around practically idle while the regular men did the work (fols. 321-322). It was understood that the union men so hired "could stand around and draw their breath if they wanted to" (fol. 316). The requirement was that union men be employed in every trade upon the understanding that if any non-union men were employed in any trade all of the trades would be pulled out (fols. 322-323).

After the defendants had established the rule that only union men could be employed, Deering issued the edict that "the Duplex press cannot come in here because there was a fight on between the Machinists and the Duplex Company and for that reason they would not give them any men to put up the exhibit." *Neither would they allow the Duplex men to put up the exhibit, or permit the Exposition Company to hire men for the exhibit* (fol. 323), *because the Duplex Company was on the unfair list and they wanted to unionize it* (fol. 324).

Thus, as in all of these cases, it was not merely a question of the union machinists refusing to handle the product, but a combination to prevent any other employees from doing the work which the union machinists were forbidden to do; a combination not only to boycott their product, but to prevent others from handling it. Young, a union machinist employed by the Duplex Company, had charge of the work for the 1913 exhibition (fol. 224) and was instructed by Deering not to go on with this work until further orders (fols. 210-211, 226). Deering said "he would let me know whether I would be *allowed* to install that machinery or not" (fols. 211, 239). This all happened before any strike was declared in the Duplex factory (fol. 226). Ultimately this exhibit was installed on a Saturday night and Sunday when other men were not working on the building, and the complainant missed the first Saturday night of the exhibition (fol. 324). The installation was done with "the consent and direction of Mr. Keppler" (fol. 226) and apparently for the sole reason that Keppler believed that the complainant had agreed to unionize (fols. 342-343).

The following October the Exposition Company made a similar contract with the complainant for an exposition to be held April 18th to 25th, 1914 (fol. 324; Exhibit 4; fols. 431-439). Again the rule was enforced that only union men were to be employed or all trades would strike. Deering told Cochrane at the beginning: "If you put in any non-union machinists up there, there will be strike and all the union men will walk out" (fol. 337). As a result of this statement Cochrane wrote a letter to all of the exhibitors requesting them to use union help (fol. 329), because he knew "that if any ex-

hibitor employed non-union help in the building that the other union men, irrespective of trade or calling, would cease work" (fol. 339). Again Deering opposed the exhibition of the Duplex press. He said "that the union would not handle their product until they were unionized" (fol. 338). The questions of defendants' counsel absolutely confirm the position "that the machinists would withdraw their labor from the Duplex Company in installing their machines at the exhibit, * * * and that if other men went in that were non-union that the union men in there would discontinue working" (fol. 338).

Deering called on Cochrane several times, and knowing that he was now master of the situation, stated that "the Duplex Company could not exhibit —he would not allow them" (fol. 325). It wasn't a mere statement that labor would be withheld, but was the statement of a man who knew he controlled the situation. The Duplex Company *"could not exhibit"*—that was the ultimatum at all times. The machines *"could not go in"* (fol. 337). He threatened to call a strike of *"all* the union men. He said all the unions were together on it" (fol. 364). Cochrane told him: "I have a contract with them," but Deering said "that would make no difference so far as their position was concerned" (fol. 326). Cochrane appealed to him that rather than have any trouble he would pay for all the union labor that was needed. This was discussed until the question of the Duplex exhibit arose, which prevented any adjustment because Deering "would not agree to let me employ union men for the Duplex Company" (fol. 326). Cochrane asked if he could not employ union men to put in the Duplex exhibit, but Deering replied "he would not furnish any union

men unless the shop was unionized" (fol. 326). He said "that Robert Hoe & Co. and Goss Printing Press Co., who were competitors of the Duplex Company, had put in a complaint to the union that if the Duplex Company was allowed to run open that they were going to break away from the union" (fols. 326-327); "that they had to make good here and enforce the union rule closed shop on Duplex, or else they were going to lose out all along the line" (fols. 327-328). Cochrane said more than once "that if they called a strike and tied up the show, they were going to hurt people like the Dexter Folder and others who are friendly to them and make innocent people suffer on account of this fight with the Duplex" (fol. 328), but Deering replied: "They could not help that because they had to enforce it, because it was their opportunity to get back at Stone, * * * that if he could get away with this exhibit this year he could get away with murder" (fol. 328). Neyland had a personal grudge. He shook his fist and said: "Stone drove my brother out of Battle Creek and prevented him from getting a job and I have a chance to get even with him and I am going to do it" (fol. 355). Neyland and Deering both stated that there was nothing unfair about the show; that they did not think they would do anything about the Oswego Machine Company, another exhibitor who was on their unfair list, but that Stone was the man they were after (fol. 329). Cochrane told him: "You are apt to ruin my business," and they replied "they could not help it." "the only way out of it was to cancel the Duplex contract" (fol. 330), and that "you have got to cancel it or else there will be a strike on this show if they try to put that exhibit in" (fol. 330).

Cochrane asked them if he cancelled the contract "would the machinists' union stand any damages that I might sustain by virtue of the breach in case the Duplex Company sued me" (fol. 331)? Deering replied that he would have to put it up to President Johnston, and while first he considered the expense of defending the Exposition Company in case of suit, he afterwards said that they would not stand anything (fol. 331). He stated that they would notify the Seybold Machine Works and the Dexter Folder Company that they all would be struck if the Duplex Company exhibited (fol. 332). Defendants were afraid the complainant would get large orders if it exhibited and they were going to prevent such a possibility unless the concern unionized (fol. 332). When Cochrane further expostulated on the ruin to his business and the injury to innocent exhibitors, Deering replied: "I cannot help it; I have orders from Johnston at Washington (referring to the International president) and we will pull all the labor union men out if the Duplex is allowed to exhibit" (fol. 332).

Keppler told Cochrane "that the members of the International Association of Machinists could not handle the product of the Duplex Company made under non-union conditions where this strike was on" (fol. 314) "unless the shop was unionized" (fol. 314). When Cochrane agreed to employ whatever number of union men was necessary, Deering stated "that the members of the International Association of Machinists will not be permitted to handle the product of the Duplex Company because of the strike at Battle Creek, Mich., *no matter who wanted them*" (fols. 315-316). Difficulties faced them on all sides. If the press went in the union machinists

would be ordered out on strike; if non-union men were employed to do the work which the union machinists were prevented from doing, the union men in other trades would cease work; it was even threatened to pull out non-union men (fol. 358).

At the very end Deering telephoned the Exposition Company stating that he had received word from the president or vice-president of the International Union at Washington that they would not defend it for breach of contract, and Cochrane told him he could not then cancel the contract, but he hoped they would not call a strike. Deering replied:

> *"He could not help it, although he realized we were innocent parties, he had instructions so that he had to stop the Duplex Company exhibit from going in the show, and would have to stop the Exposition from opening and the Duplex Company from getting any benefit out of it"* (fols. 362 363).

The issuance of a preliminary injunction frustrated the plans of these defendants, but the danger is still present as the Exposition Company is still engaged in the same business (fol. 361).

Italian Herald.

In December, 1913, by written contract, the complainant sold a press to the *Italian Herald*, 28th Street, New York City. Before the press arrived Deering called on the *Italian Herald* and stated:

> "I am informed that the *Italian Herald* signed a contract with the Duplex Company; no right to sign any contract because the Duplex Company is on strike. The *Italian*

> *Herald* knows that the Duplex Company is an open shop and they shall not buy any presses from them. We are informed that part of the press was already shipped to New York, and as soon as the press came to New York, *we will give a trouble for the Italian Herald and the Duplex and we try to make all the trouble possible to the Duplex*" (fols. 312-313).

When the press arrived Deering sent Burkle, one of the union pickets, to the railroad docks to find what car contained the press for the *Italian Herald* (fol. 251).

The work of installation was originally started on Wednesday or Thursday (fol. 298) with one supervising erector employed by the complainant and the other labor employed by the *Italian Herald* (fol. 298). Burkle acted as a picket on the job (fol. 212) and was present when the Britton Trucking Company was told not to handle any more of it and the men quit work (fol. 252). Another truckman finished the job (fol. 272). The labor employed by the customer all quit work (fol. 298). Deering came up to the job and stated "that our men would be taken off the work; and the different members of different building trade unions that were at work on the building would be called off on strike" (fols. 285, 296-298). He himself threatened to do this (fols. 297, 300), and the owner feared "the completion of the building would be held up for two or three weeks" (fol. 296). The owner said the press work could not be done until after the union men in all the other trades "had completed the work on the building and left entirely" (fol. 292), because these other trades would be ordered out on strike on account of the employment of a non-union

man by the *Italian Herald*. The questions of counsel for defendants and the answers establish the allegations of the complainant that if non-union men are employed to install the presses the other trades connected with the building will be called out on strike (fols. 291-293). Because of Deering's threats of disruption the work had to be postponed until Saturday afternoon, all Saturday night and Sunday morning, when the other trades would not be working (fols. 285-287, 292).

By this postponement Deering was eluded, and the following day when he met the complainant's representative he said:

> "You put one over on me this time but you will never do it again and *I am going to make it more and more difficult for the Duplex Printing Press Company to make installations, and will interfere with their work in every way possible. I am very sorry for the salesmen; it is going to be more difficult for the salesmen to get orders for Duplex presses*" (fols. 287-288).

In February, 1914, Young was also supervising the erection of a press for the *Italian Herald* at No. 115 East 28th Street (fol. 212), and when the press was brought up by the truckman Deering told the truckman to quit work. Deering reported to union headquarters that he caught the man delivering it, and the delivery of the press was stopped (fol. 218). Later Deering came to the building on two occasions and told Young that he had "better quit or he would take my card away" (fol. 213). He told Maddock, another mechanic, to get off the work and insinuated that he would have the pressman's card withdrawn (fol. 114), and when Maddock refused he

walked out, saying, "Very well, my laddie" (fol. 114). On the following day, while Maddock and Young were on their way home, they were struck from behind and knocked senseless on the sidewalk about a block away from the building (fols. 214, 416), the usual result of such work of obstruction.

BOLLETINO DELLA SERA.

The complainant by written contract sold a newspaper press to the *Bolletino della Sera*, at 178 Park Row, New York City (Exhibit 5, fols. 440-449), and the work of erection, which commenced in December, 1913, was supervised by Charles Young (fol. 207). Deering told him "not to erect the machinery," and after he started to unload it "ordered the men that were working with me to quit work, which they did" (fol. 207). They stopped at Deering's direction (fol. 233). These men were probably members of the Machinists' Helpers' Union (fol. 208) and were unboxing and cleaning the machinery and carrying it into the building. A half a load of machinery was left on the sidewalk and had to be loaded on the dray again and taken away (fols. 207-208, 235). A day or two later Deering again met Young on the sidewalk and "*he stated he would do everything they could to prevent that machinery going into the Bolletino della Sera, and that he had notified the repair shops in that locality not to do any repairing on that machinery. He also told me that he had heard of one or two breakdowns on Duplex machinery recently, and that there would be more the first of the year*, as they were going to take aggressive action against the Duplex Company" (fols. 208-209); "that there was a prospective

purchaser for Duplex machines in the Bronx, but that he had put a stop to that deal" (fol. 209).

Young particularly requested him to let the press sold to *Bollettino della Sera* be installed, because the machine had not come from the plaintiff directly (fol. 232), but Deering replied that there was a strike against the plaintiff and "the members of the International Association of Machinists would not work upon their production" (fol. 232); that he could not let the members work on the machines "without receiving permission from the International headquarters of the Machinists' Union" (fol. 229).

Nicoletti Bros.

In 1913 the complainant by written contract sold a press to Nicoletti Bros., on Lafayette Street, New York City. In November, 1913, Young received the bill of lading and started to take it to the Britton Trucking Company, when he met Burkle and Soeller, the union pickets and former employees of the plaintiff (fol. 202), and went with them to see Deering at union headquarters (fol. 202). Deering asked Young if he sided with the union or the Duplex Company and Young, who was a member of the Machinists' Union, replied that he sided with the Duplex Company (fol. 203), and he and Burkle and Soeller all agreed that they had been treated fairly by the Duplex Company (fol. 204), and while in its employ had received as high a wage as they had ever received. Deering told Young he did not have to look after the installation of that machine and that he could send word to Mr. Stone, the president of the complainant, that he was afraid to install it. Young replied that this would be un-

true, but Deering stated that he "had good reasons to be afraid to look after the Duplex Printing Press Company's work" (fol. 205). Deering stated that "he would take my card away from me and would blacklist me as a scab all over the East" (fol. 206). He told Young as a member of the union "not to work upon the machinery of the Duplex Company" (fols. 227, 233). He followed Young down to the office of the trucking company without invitation and directed the truckman "not to haul the machinery" (fol. 206); that "it would make trouble" for him if he did (fol. 269). The truckman accordingly refused because Deering "would pull the men off the job" (fol. 269). Burkle and Soeller were appointed by Deering to act as pickets on the Nicoletti job, and tried to get its erector to quit work (fols. 255, 245-246). Burkle heard Deering report at the local lodge concerning the Nicoletti Press "that he got the man delivering it, and the press was stopped" (fol. 247). And it appears that Deering had been up to this job making his usual threats about causing the complainant trouble *on all its work "in this city"* (fol. 281), and tried repeatedly "to call the men off the job of handling the machine" (fol. 281), but had been refused admission to the building (fol. 280). Soeller told Burkle on this occasion that he was to stay away from the job, because "something was going to happen, and that if they got hold of me that I could prove an alibi" (fol. 251).

New York Law Journal.

The *New York Law Journal* purchased a press from the complainant in October, 1913 (fol. 303). Deering called at their place of business in the lat-

ter part of October (fol. 303), and said: "You are going to put in a press next week in here—you have ordered a press. *I will tell you there is a strike on at Battle Creek and you will not be able to have that press hauled to your place * * *. Truckmen and the helpers on these machine-moving trucks are all now in the Machinists' Union and they will not haul any machines * * *. You cannot haul out the machinery, and it is no good to you on account of this strike at Battle Creek*" (fols. 304-305). The press was delivered in January, 1915, and after the men had carried several crates into the building Deering appeared and said: "Here, I told you fellows not to do this; you know you should not do it" (fol. 306). He told the truckmen "to quit the job" and "stopped the job" (fols. 270, 310). The men were employees of the trucking company (fol. 270), and the *Law Journal* man told them "Britton is your boss" (fol. 306). The job was nevertheless stopped, the men quitting work for a little time, but Deering finally let the first load go in (fol. 307). Part of the loads had to be carried away to the stables (fol. 271), but all were finally redelivered. All this disturbance was because of trouble at Battle Creek—a thousand miles away.

On another occasion, when the press for the *New York Law Journal* was being erected, Deering stated

> "*that he was going to do all possible to prevent the wheels of the Law Journal press revolving. If he could help it the press would never be started up in New York City. He said that the unions had unlimited financial means with which they could fight the Duplex Printing Press Company* and which they were to use for that purpose; that eventu-

ally the Duplex Company would have to give in to the union, as other manufacturers had given in to the union" (fol. 289).

PLAINFIELD PRESS.

The *Plainfield Press*, of Plainfield, N. J., purchased a press from the plaintiff in 1912, and was visited by Hugh Riley, of the Machinists' Union (fol. 262), who was also one of those attending the St. Louis conference of the general officers of the Machinists' Union somewhat later (fol. 158). Mr. Riley intimated "that we might have trouble with the union pressmen" on account of the press (fol. 266). The customer replied it was nearly erected, and Riley went down and told the erector he had better quit work; that he had no business erecting that press (fol. 263). As a result of these happenings the *Plainfield Press* declined to consider making further purchases of the complainant, and wrote it a letter on December 31st, 1915, in which it referred to this 1912 trouble, and stated: "We do not care to encounter anything of that kind again. There are a large number of union machinists in this city, and the union is recognized by practically every shop, so that we do not care to run any risks again" (Exhibit 2, fols. 427-430).

The attack is not limited to a refusal to handle Duplex presses, but includes steps to prevent others doing this work which the union machinists are prohibited from doing.

The defendants claim exclusive jurisdiction over the work of installing presses, and will not let any other union men like the pressmen, or any non-union men, do the work if they can help it. They say, in

effect, to the complainant's customers: "Under no circumstances will we allow any but our members to do this kind of work, and in the case of the Duplex presses these members cannot do it; we refuse to allow our members to do the work, and by sympathetic strikes of other trades and other means we will obstruct any attempt to employ other men to do the work which our members are forbidden to do; our aim is to prevent the sale, installation and operation of those presses until the conditions under which they were built at Battle Creek are changed."

The principal means of preventing the employment of non-union men to do the work which union machinists are forbidden to do is through their affiliation with the Building Trades Council, which has a membership of 75,000 from thirty different trades (affiliation and size admitted as alleged in Par. 5, Complaint). These building trades in New York have issued a notice, "To Owners, Architects and Contractors," that "none but members of the International Association of Machinists be employed in the building, assembling, erecting, dismantling or repairing of machinery," and that they must take cognizance of this fact in order to avoid trouble (fols. 166-168). Questions of defendants' counsel and their answers avow and prove "that the machinists would withhold their labor from the Duplex Company in installing their machines * * *, and that if other men went in that were non-union, that the union men in there would discontinue working."

In the case of the *Italian Herald*, also, Deering threatened that the various trades working on the building would quit work on the building (fols.

296-298, 291-293, 285-287). Again, the very questions of defendants' counsel admit and successfully establish the fact that all trades quit if a non-union machinist is employed.

At the expositions in April, 1913 and 1914, it was necessary to employ union men in all trades because of Deering's statement that all union men in all trades would be pulled out by him if any non-union men were employed (fols. 322-323, 337).

They seek control of all the erection work (fols. 169-189), and then use that control against the product of those employers and employees who do not operate according to their dictation. As was said at the St. Louis conference:

> "Where we have gained absolute control of the erection, there has been no trouble in organizing and keeping organized the shops where the product was manufactured" (fol. 188).

Violence.

The atmosphere of violence pervades the case. You cannot ordinarily employ non-union men without meeting interference, violence and threats (fols. 275-277). "They scare other men when they want to work that are not members" (fol. 358). Deering laughingly told Young "he would shoot me" (fol. 211), and that there was reason to be afraid (fol. 205). Burkle was told by Soeller, a fellow-picket, to keep away from the Nicoletti job on a certain day because "something was going to happen, and that if they got hold of me that I could prove an alibi" (fol. 251). He never heard any orders issued for any particular assaults, but heard remarks to the effect that "sometimes a sidewalk would jump

up in the air and hit a fellow in the face" (fol. 260). Both Young and Maddock were knocked unconscious a day after Deering had exhausted his powers of persuasion with them (fols. 214, 416), and Burkle, who was partly on the inside, "was not a bit surprised" (fol. 256). The truckman told in a most natural and spontaneous manner the violence and interference which meets an attempt to employ non-union men (fols. 275-277). These things must be considered when we measure the effects of an organization which seeks to monopolize the construction work and in the same breath refuses to perform it or have anyone else perform it when the complainant's products arrive.

General Boycott Agitation.

There is also a general boycott campaign afoot. Deering says "that there was a prospective purchaser for Duplex machines in the Bronx, but that he had put a stop to that deal" (fol. 209). Similar remarks were made at the time of the *Italian Herald* trouble. He knew of a likely customer who was considering a Duplex press and was "going to try and influence him to place his order elsewhere" (fol. 288). He was sorry for the salesmen, because it was "going to be more difficult for the salesmen to get orders for Duplex presses" (fol. 288). Deering said the company was on the unfair list (fols. 324, 290), and the circulars exhort everybody to try to persuade people not to buy Duplex presses (fols. 152, 147). A greater campaign of unfriendly advertising is contemplated.

> "He said that the machinists' union would probably circularize among all the union members of the different trades that were employed by newspaper publishers, thereby

> influencing these unions to discriminate against the Duplex Printing Press Company's machinery" (fol. 290).

During the erection of the press for the *Italian Herald* Deering "predicted that there would be numerous breakdowns of Duplex Company machinery throughout the country *because we were on the union's unfair list*" (fol. 290). That shows the disastrous effects of this hostile propaganda—it will result in numerous breakdowns. *What stronger reason could there be for enjoining the use of this talismanic word "unfair"?*

The ultimate object of defendants was to unionize the complainant, and the granting of all other demands would not appease them.

Keppler demanded repeatedly and at all times that the factory be unionized (fols. 419, 380-381). All through the record it appears that unionism is the only price of peace (fols. 383-384, 342-343, 312, 324, 273-274, 282, 175, 376). Keppler said again and again that their members could not handle the product of the complainant "unless the shop was unionized" (fols. 344-345). The quarrel was because complainant ran an open shop "* * * and that they would not handle the product until they were unionized" (fol. 338). They even tried to prevent them exhibiting their wares to the public at the National Exhibition unless they would unionize (fols. 332, 326-328, 324). The complainant actually granted the demand as to eight hours, but it did no good (fols. 152-153, 123). Deering said: "They had to make good here and enforce the union closed shop rule on Duplex or else they would lose out all along the line" (fols. 327-328). "If they

organized the plant at Battle Creek, that they would go ahead and handle the Duplex machinery" (fol. 356).

The defendants, acting in part at the instance of complainant's competitors, are engaged in an interstate scheme to protect union manufacturers of printing presses controlling 93 per cent. of the business from the interstate competition of the complainant, the only surviving open shop manufacturer, and to exclude this open shop manufacturer from the field in order to monopolize the business for those who operate according to their terms.

This particular industry is in the hands of four companies—R. Hoe & Company, of New York City; Goss Printing Press Company, of Chicago; Walter Scott & Company, of Plainfield, and the complainant (fols. 373, 408). R. Hoe & Company, the largest of these manufacturers, is ten times the size of the complainant; the Goss Company is twice as large, and the Scott Company is but a little larger (fol. 373). All of these concerns, except the complainant, were unionized within two years prior to the commencement of this suit (fol. 373), and one of the causes of complainant's trouble seems to have been the persistent demand by the complainant's competitors to force the complainant to also unionize or to protect them from the complainant's competition. The complainant, therefore, doing about 7 per cent. of the trade, is opposed by a combination doing 93 per cent. of the trade. Even prior to the strike in August, 1913, defendant Keppler stated

"that R. Hoe & Company, the Goss Company and the Walter Scott Company were in direct competition with us and that they were all unionized; that it was not fair to them that we should be out of the union; that it was their duty to equalize conditions throughout the country in such cases as this and therefore they must insist that we unionize" (fols. 383-384).

When at the very outset Keppler prepared his letter of August 22nd, 1913, in which he frankly states that his general board had instructed him "to prepare for action" (Exhibit 7, fols. 455-471), he mailed it not only to the complainant, but "also to some other employers in this industry" (fol. 112), showing he was working in collusion with them and with their sanction.

At the St. Louis conference in March, 1914, the same idea appears again in Keppler's reports:

"Strikes have also been in progress in this line for some time for eight hour day at the Oswego Machine Co., of Oswego, New York, Duplex P. P. Co., of Battle Creek, Mich.; both had been operating on the ten-hour basis. While conferences are being held with various employers in this industry, the cry of their competitors is continually heard, especially referring to these firms mentioned in the *Organizer* of October 25, 1913. Vice-President Keppler wishes to again call your attention to the fact that a majority of the printing firms in New York City and Plainfield have granted an eight-hour day on the installment plan, and *unless their competitors are brought to the same terms*, we are liable to lose all the conditions we have already gained or face a big strike of printing machinery shops in the spring" (fols. 174-176).

From other reports of Keppler's it appears that the complainant's competitors are instigating this destruction of their rival's business. "He said that *Robert Hoe & Co. and Goss Printing Press Company, who were competitors of the Duplex Company, had put in a complaint to the union that if the Duplex Company was allowed to run open, that they were going to break away from the union*" (fols. 326-327); "that they had to make good here and enforce the union rule closed shop rule on Duplex, or else they were going to lose out all along the line" (fols. 327-328). Neyland and Deering gave as their reason for refusing to allow their members to handle machinery "that if the Duplex Company did not accede to the same conditions as Goss and Hoe, Goss and Hoe would then throw *open* their shops" (fol. 353). In other words, if the Duplex Company did not unionize and run a closed shop they would abandon the closed shop regime and operate an open shop.

It is a boycott and not a strike case, the attack not being limited to complainant's productive organization, but extending to its trade and commerce.

This is not an ordinary labor case in which the defendants have sought to improve their conditions of employment by a strike and incidental picketing against their employer, to which the ordinary rules relative to labor unions are applicable. Such a case involves manufacturing and production, which are the peculiar concern of labor unions. This case relates to trade and commerce.

> "Commerce succeeds to manufacture, and is not a part of it. * * * Manufacture is

transformation, the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incident thereto constitute commerce."

U. S. v. Knight, 156 U. S., 1.

"Here, however, the question concerns not the process of manufacture, but the manufactured product—an article of commerce."

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S., 373.

The attack is upon complainant's *trade and commerce*, and there is not, nor has there been, any strike or discontent among the complainant's employees, except the ordered quitting work on August 27, 1913, of eleven out of 200 in the factory at Battle Creek and three road men erecting presses in different parts of the country. The complainant's productive organization is intact, and there is a harmonious co-partnership between it and its employees, producing goods which are being attacked by union men in the interest of union factories and their employees. If complainant's employees were dissatisfied and had withdrawn from their employment with the complainant, and there was nothing else in the case, it would be a strike case, but since outsiders are trying to attack the trade and commerce being carried on through a harmonious partnership of labor and capital it is a boycott case. This is the distinction which the Trial Judge failed to appreciate when he treated strikes against our customers to destroy our trade, the same as the strike of eleven men at Battle Creek. When employer and employees are working happily together

to such an extent that the workmen refuse all inducements to strike, any further interference with their rights, whether it be violence, intimidation or a boycott of the fruits of their toil, is illegal. If strikers or labor union representatives cannot persuade men to quit work their rights are exhausted and they cannot resort to additional and more drastic methods. A strike is a fight between labor and capital, where labor withdraws from its co-partnership with capital, and such a withdrawal because of dissatisfaction with the terms of the partnership is lawful. But a boycott necessarily implies that the goods are being produced by an existing organization of labor and capital, so that any attack on the goods and the sale of those goods is an attack upon both labor and capital, by union men working in the interest of union employers—and sometimes at their instigation—to prevent the sale of the open shop products and secure a monopoly for the union-made products; it is the open shop employer and his employees on the one side and the union employer and union employees on the other side, and the legality of the combination is not to be tested by the rules applicable to a labor-capital fight where labor merely withdraws from its partnership with capital, but is to be tested by the anti-trust laws which define the lawful methods of competition in the sale and distribution of products.

One of the purposes of the anti-trust laws is to give the public the benefit of free competition, so that all products surviving the battle of fair competition may flow naturally into the public markets of the nation for the selection of consumers. Any artificial or unreasonable obstructions to trade which deprives the public of these advantages necessarily violates the anti-trust laws.

To unduly restrict competition or obstruct the course of trade is injurious to the public because it deprives that public of its inherent right of enjoying the service and the fruits of the service of everybody, and because if the obstruction is successful it keeps goods from the market and restricts the public's right of choice in determining what articles it may purchase. Any combination which, by artificial means, seeks to obstruct the course of trade, is illegal, and only that obstruction is tolerated which is incidental to the ordinary and regular pursuit of a business. The combination in the case at bar and the injury which it has inflicted and threatens to inflict upon the complainant was not incidental to the pursuit of any legitimate business, but had for its sole and direct purpose the suppression of the complainant's competition by erecting an artificial barrier between complainant and its customers and destroying its interstate trade.

The object of the defendants is to prevent the sale and use of machines unless they come from factories operated and exclusively manned by members of the combination and in accordance with methods approved by it. According to the defendants' contentions, and the contentions of the union factories which have conceded their demands, they must protect the union factories from the competition of the open shop factories, because, under the natural laws of trade and competition, the union factories cannot survive with their increased cost of production. Not being able to control the complainant's producing organization at Battle Creek because the employees are contented with their employment, the only possible method by which this could be accomplished is to restrain the trade and commerce of the com-

plainant by making their products unsalable. This is done by calling strikes against their installation, preventing common carriers from hauling them, threatening purchasers with strikes of pressmen, and with the impossibility of operating the presses, causing breakdowns of such presses, preventing their repair, and finally even seeking to suppress their public exhibition and advertisement. If this can be done the barrier between the complainant and the public market will be unsurmountable.

There is no relation between the complainant's factories in Battle Creek and the places where the presses are to be exhibited, hauled, installed or operated, except commerce, so that the only way in which the conditions in the factories can be affected by the conduct of the men at the place of consignment is by controlling commerce. How can the means adopted, viz., refusal to haul, install or operate said machines, accomplish the purpose, viz., of controlling conditions of manufacture in the factories a thousand miles away, except by restraining trade or commerce, and why do the members of this combination adopt this *means* to attain this *end* unless they calculate and intend to restrain trade and commerce? The device is adopted for, and adapted to, the restraint of trade. This is in effect a combination of union factories, with the union employees, to suppress and destroy the interstate trade and competition of the only remaining open shop factory with non-union employees; if it be lawful, then capital has the right to destroy its competitors by instigating organized labor to conduct boycotts against them, for surely organized labor has no greater right to do this on its own initiative for the benefit of the union employer than it has to do it at the instigation of the union employer.

The unreasonableness of this combination and its injury to the public is shown by the manner in which it proceeds. It is not a persuasive appeal to the public to buy union machinery, as in the case of the Consumers' League and the legitimate advertisement of union labels, but is a combination to deprive the public of the opportunity of choice and prevent it from securing the benefits of this improved machinery. The scheme to prevent the presses from being exhibited at the exposition is equivalent to a combination to call strikes against newspapers which advertise some wares which the public requires, or a combination to boycott the dealer who carries hats without the union label. Instead of appealing to public sympathy or choice, it seeks to keep the proscribed goods out of the public reach, so that the public is deprived of its sovereign right of choice—its right of commercial suffrage. The same may be said of strikes against the truckmen and the purchasers of the presses. These are not persuasive appeals to the publishers, but attempts to constrain and coerce them by threats of serious difficulties if they purchase the boycotted material. Such combinations coercing the purchaser deprive the public of the natural opportunities afforded by competition to receive the benefits of improved machinery and are therefore against public policy and violative of public interest. If labor combinations, through the vast economic power which they have developed can dictate to the manufacturer, the mining operator, the railroads, the publishers, and others, that they shall not use a certain improved machine, then the progress of industry is throttled indeed and public interests are set at naught. In this case the combination asserts the right of making a certain product a con-

traband of commerce—a kind of commercial leper; it is to be made worthless, unsalable and unmarketable by preventing its being hauled, installed, operated or even exhibited to the public. If this can be done in the case at bar because the machines are made in Battle Creek, it can be done because some of the metal came from the Calumet and Hecla mines in Michigan; it will permit the institution of strikes on buildings because the metal of the door knobs came from a non-union mine, the wood of the window-frames came from a non-union logging camp, or the stone came from a non-union quarry. It is purely a question as to whether the economic power of these vast labor organizations, when having no other purpose to serve than the suppression of non-union competition, may dictate what shall be transported by a common carrier, what goods shall be advertised, exhibited or sold by our merchants; and what goods shall be purchased or used by manufacturers, publishers, contractors and others requiring the employment of labor in the production of articles for public consumption. Fortunately the law cries a halt far short of what has been done by the defendants in this case, and even the issuance of an unfair list designed to have a large body of customers refuse to patronize a given line of goods constitutes a violation of the Sherman Anti-Trust Law regardless of any coercion against those purchasers or any agreement as to its observance.

POINT I.

The combination violates the Federal Anti-Trust Law and the complainant is entitled to an injunction under the Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other unlawful purposes."

The right to work or quit work is no more absolute than any other constitutional right and ceases to be a right when exercised for the purpose of injuring another or accomplishing a result contrary to public policy or restraining trade contrary to law.

Aikens v. *Wisconsin*, 195 U. S., 204.
Gompers v. *Buck's Stove & Range Co.*, 221 U. S., 418.
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S., 229.
Paine v. *Neal*, 244 U. S., 459.

"The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."

Loewe v. *Lawlor*, 208 U. S., 274; 235 U. S., 522.
Montague v. *Lowry*, 193 U. S., 38.
Eastern States Lumber Dealers v. *U. S.*, 234 U. S., 600.

U. S. v. *Patten*, 226 U. S., 525.
Standard Oil Co. v. *U. S.*, 221 U. S., 1.
State v. *Duluth Board of Trade*, 121 N. W., 395 (Minn.).

The opinions of all the judges in the Circuit Court of Appeals agree that the combination proven here is indistinguishable in legal principle from that defined in *Loewe* v. *Lawlor* by the last quotation.

A private party is entitled in appropriate cases to an injunction against acts in violation of the Federal Anti-Trust Law. Section 16 of the Clayton Act, which affords that remedy, provides as follows:

> "That any person, firm, corporation or association shall be entitled to sue for, and have injunctive relief, in any court of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the Anti-Trust Laws," etc.

Although the case at bar was commenced before the enactment of the Clayton Act, unlike the *Paine* case the final trial and judgment and some of the acts proved were all subsequent to such enactment. The attorneys for both sides, as well as all of the judges in the two courts which passed upon the case, admit that this act is applicable. Laws of this character are retroactive at least to that extent.

Sampeyreac v. *U. S.*, 7 Peters, 222.
U. S. v. *Schr. Peggy*, 1 Cranch., 105.

In equity even on appeal the Court will take account of a change in the law, refusing to continue

a perpetual injunction properly granted, where a subsequent law makes it no longer proper.

Penn v. *Wheeling Bridge Co.*, 18 How., 421.

All of these points are conceded by the judges of the Circuit Court of Appeals, the decision of the two judges dismissing the case being based solely on the claim that the labor provisions of the Clayton Act have repealed the doctrine of the *Danbury Hatters'* case and legalized the secondary boycott.

These so-called labor provisions are as follows:

"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from *lawfully* carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employes, or between employers and employes, or between employes, or *between persons employed and persons seeking employment*, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irrepar-

able injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might *lawfully be done in the absence of such dispute by any party thereto;* nor shall any of the acts specified in this *paragraph* be considered or held to be violations of any law of the United States."

We submit that there is nothing in these sections which legalizes conspiracies or forbids the issuance of injunctions in cases like this, and propose to discuss this question under three heads:

(a) The natural meaning of these sections as found in the language employed and the constitutional difficulties involved in the defendants' contentions.

(b) Decisions construing these sections.

(c) The history of these sections and the evils sought to be remedied thereby.

A.

There is nothing in the act which indicates any intention on the part of Congress to "draw the teeth" of the Anti-Trust Law and everything points to a determination for more stringent enforcement through supplementary legislation. At the very outset all of the anti-trust laws are enumerated and generically described as "anti-trust laws" and this opening paragraph is soon followed by Section 4, which expressly reaffirms the right to sue for treble damages under the original anti-trust law. Section 16 expressly gives the right to injunction against threatened damage by violation of the "*anti-trust law*," which according to the opening paragraph of the act includes the original Sherman Anti-Trust Act of 1890. The original Anti-Trust Act of 1890 is therefore repeatedly reaffirmed. Under such circumstances it is startling to hear the contention that *Loewe* v. *Lawlor*, one of the foremost and most frequently cited decisions under the anti-trust laws and dealing with one of the commonest methods of restraining trade, has been wiped out.

Section 6 declares that the Anti-Trust Law shall not forbid the existence and operation of a labor organization, but there seems to be little claim that

it affords the defendants immunity in a case like this. Even Judge Hough felt "assured of the inapplicability of Section 6." The presence of Section 6, as shown by the history of the legislation, which is later discussed, is due to the fact that it was thought desirable to put at rest the contentions of some that the *mere existence* of labor unions for legitimate purposes was forbidden by the Sherman Anti-Trust Law.

Section 20 has no application to the case. It is limited to litigation "between an employer and employees or between employers and employees, or between employees or between persons employed and persons seeking employment involving or growing out of a dispute concerning terms or conditions of employment." It is obvious that none of the defendants is or has been or probably ever will be an employee of the complainant, whose factories are situated a thousand miles away from the state where the defendants reside. The limitation with which this section commences therefore excludes its application to the case at bar.

As a general proposition even workmen on strike are not "*employees.*"

> *Atchison, T. & S. F. Ry. Co.* v. *Gee*, 139 Fed., 582.
>
> *Knudsen* v. *Benn*, 123 Fed., 636.
>
> *Union Pacific R. R.* v. *Ruef*, 120 Fed., 102.
>
> *Iron Molders* v. *Allis Chalmers*, 166 Fed., 48 (Judge Grosscup's opinion).

It would seem that the word employee implies the existence of a continuing employment relation.

> *Louisville, etc., R. Co.* v. *Wilson*, 138 U. S., 561; 34 L. ed., 1025.

Judge Grosscup's concurring opinion in the *Iron Molders'* case holds that men on strike might still be regarded as having some relationship to their employer, but are not employees. Then surely outside representatives of labor unions, who are professional business agents and not workmen, are not to be construed as employees of a company a thousand miles away. The various acts specified in Section 20, as acts which are not to be enjoined, have some reasonable significance when considered as the acts of employees carried on incidentally with the calling of a strike, but are not acts which can be lawfully and properly carried on by outsiders. If, as Judge Hough holds, the words employer and employee as used in this law include all workmen and industrial managers regardless of the fact that they occupy no employment relation to each other, and like union officers may for the time being hold no employment in any industry, then why did Congress add the words "persons seeking employment" in the opening qualifications of this section?

If this law is given the interpretation called for by the defendants, the phrase "dispute concerning conditions of employment" is also given an unreasonable interpretation and effect. The defendants' contention and the decision of the Circuit Court of Appeals lead to the conclusion that a dispute concerning conditions of employment between the complainant and any one of its employees justifies all of the other so-called employees in the United States, including the 3,000,000 members of the American Federation of Labor, engaging in a conspiracy to prevent the sale of articles made by 99 10 per cent. of the contented employees of the complainant. If, as in this case, the union can create a necessary dispute to legalize its attack by ordering 5 per cent.

of the workmen to quit, they may likewise open the flood gates of destruction against the joint products of the employer and his 99 per cent. contented employees by merely showing that 1 per cent. has responded to its orders.

Under the circumstances surrounding the construction of these provisions a court should not give the words "employer" and "employee" and "dispute" an unusual and distorted meaning when to do so will be contrary to the established judicial definition of these words, will make other words in the statute mere surplusage, and will accomplish an unfair and unfortunate result. In order to invoke whatever limitations of judicial jurisdiction may lurk in Section 20, there must be a suit between employer and employees, etc., involving or growing out of a dispute concerning terms of employment. And it is, of course, obvious that it refers to a dispute between the employers and employees and does not extend any immunity to outsiders or sympathizers. It is particularly imperative that this qualification in the law be given effect, for it is not merely an anti-injunction law, but a declaration of substantive law, closing with the declaration "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." Certainly the words "employer" or "employee" or "dispute" should not be extended beyond their natural meaning when to do so will make it operate in derogation of common rights of the particular class of litigants specified.

The intent of Section 20 was to forbid the issuance of injunctions in those cases only, where the acts enumerated in its several clauses would not be "*unlawful* in the *absence of such dispute*," referring,

of course, to a "dispute concerning terms or conditions of employment" between the several classes of persons enumerated in the first sentence of the section. The words "lawfully be done" and "in the absence of such dispute" in the last clause of the sentence apply to, limit and control each of the acts enumerated in the several preceding clauses of it, because the acts specified in the preceding clauses are all included within the words "any act or thing" in the last clause. Here again our contentions are confirmed by the history of the legislation.

It is those acts only which the Federal courts are not to hold or consider to be violations of any law of the United States or to enjoin. The several acts enumerated in the several clauses, if they would be unlawful "in the absence of such dispute," can still be enjoined by the Federal courts, and they can still hold them to be in violation of any statute of the United States which forbids them. Acts which were unlawful before the passage of the Clayton Act are still unlawful under it, because they are unlawful independently of and in the absence of a trade dispute. That is the plain, sensible meaning of this section, resulting from the words used and their arrangement in relation to each other and to the subject, and as we will later show, it is the meaning supported by the history of the legislation.

In other words, in trade dispute cases the presence of a trade dispute shall not itself taint the specified acts with illegality if they are otherwise legal. In determining the lawfulness of the interstate secondary boycott in trade dispute cases, it is necessary to ask whether such a boycott would be lawful in the absence of a trade dispute. The

answer to this question is "certainly not" (*Eastern States Retail Lumber Dealers' Ass'n v. U. S.*, 234 U. S., 600). Since, therefore, the secondary boycott is still unlawful in the absence of a trade dispute, it must likewise be unlawful when connected with a trade dispute. This whole section of the law, as shown by its history, was only intended to put at rest the contentions of labor, fallacious though they were, that the courts discriminated unfairly against lawful acts in trade dispute cases. The secondary boycott therefore remains as unlawful as ever.

It is further obvious that the various acts mentioned in section 20 against which injunctions shall not issue in this limited class of cases are most of them acts which in and of themselves are ordinarily lawful as between an employer and his employees, and that this section accomplishes no other purpose than to declare the previously existing law on this subject. It merely declares that the acts specified *of themselves and by themselves* shall not be held to violate any Federal law, but it does not mean that jurisprudence shall be revolutionized by declaring that such acts may be done with impunity to accomplish criminal purposes. If, as stated by this Court, not even the recognition of a right by the Constitution can justify its exercise in furtherance of a criminal plot (*Gilbert v. Wisconsin*, 195 U. S., 191), and the constitutional privilege of free speech cannot be used as a defense to an injunction which restrains speech or writing, in furtherance of an illegal conspiracy (*Gompers v. Buck Stove & Range Co.*, 221 U. S., 439), then it certainly follows that the recognition of a right by a statute such as the Clayton Act will not justify the exercise of that right in furtherance of a criminal con-

spiracy, which is expressly recognized by the same statute. When these acts are used in furtherance of a criminal plot they become acts of an entirely different character from those described by this section, for they are colored, and their character determined by the illegal plot.

Under any other construction the United States Steel Corporation could destroy its competitors by arrangements with the union, whereby they would call strikes on every railroad, in every factory, and on every building where competitors' products are used, and the whole purpose of the anti-trust legislation would be thus defeated. No civil suit could be maintained in this class of cases under the authority of *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S., 205, against parties who induced a breach of contract. Vital provisions of the Interstate Commerce Act (Secs. 7 and 10 as amended, 36 Stat. at Large, p. 548); of the law forbidding the enticement of workmen from U. S. arsenals and armories, R. S. Sec. 668, 35 Stat. at Large, 1097, U. S. Crim. Code 12, Sec. 47; of the law forbidding the enticement of sailors and soldiers, R. S. 1753, 35 Stat. at Large, 1097, Crim. Code, Sec. 42; of the law which forbids deserting the mails, 35 Stat. at Large, 1126, (R. S. 5471, Crim. Code, Sec. 190; of the law against obstructing the mails, R. S. 3995, 35 Stat. at Large, 1127, U. S. Crim. Code 41, Sec. 201; of the law forbidding ferrymen from delaying the mails, R. S., Sec. 3996, 35 Stat. at Large, 1127, U. S. Crim. Code 41, Sec. 202; of the law against obstructing operations of railroads under Federal control, 40 Stat. at Large, page 457, Chap. 25, Sec. 11;—would be *pro tanto* repealed by a construction of the Clayton Act which would legalize the acts specified in Sec-

tion 20, even when exercised for purposes forbidden by these enumerated statutes. Strikes could be called to prevent the carriage of a non-union man to the shop or non-union merchandise to the dealer or consumer, and shippers could thereby be discriminated against in violation of the terms of the Commerce Act. Important cases laying down principles essential for the protection of public interests would be repealed (*Fuhrer* L. L. and N. M. R. R. Co. v. *Penn Co.*, 34 Fed., 738; *In re Debs*, 158 U. S., 383; *Loewe* v. *Lawlor*, 208 U. S., 274; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S., 418). It would be possible to keep proscribed merchandise out of the reach of the consumers and thereby deprive the public of its right of choice.

To illustrate this point: New York has a statute which makes it a crime to extort graft money by instituting or threatening to institute a strike (*People* v. *Hughes*, 137 N. Y., 29). If New York State were now to pass a law declaring it lawful *for men to strike and to persuade men to quit work in a body, could it be successfully contended that this statute against graft and extortion was nullified to that extent? We think not.* Section 582 of the Penal Law of New York declares that "an orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation or of maintaining such rate, is not a conspiracy." But in spite of that act it is still the law of New York that certain economic combinations for higher wages on the part of labor, where no violence or disorder is involved, violate the statutory and common law (*Auburn Draying Co.* v. *Wardell*, 227 N. Y., 1; 89 Misc., 501; *People* v. *Davis*, 159 App. Div., 464,

Bakewell v. International Union, 66 Misc., 328).

Physicians could be paid strike benefits as an inducement to quit work in the midst of an operation; engineers could be induced to desert their trains under conditions involving certain loss of life; contracts would become worthless both as between the parties who could quit work regardless of them and as against the intrusion of third parties who could recklessly induce their breach; firemen could go on a strike when a building was burning and life, liberty and property could thus be jeopardized, if laws of this character were to receive the construction contended for.

There is a large volume of statutory and constitutional enactment, both State and Federal, which, like the Clayton Act, expressly sanction many acts relating to liberty and property, but up to the present time it has never been successfully contended that such provisions and the rights which they assert were not subject to, and qualified by, other statutes, whose violation may be accomplished through the performance of such acts. The whole basis of jurisprudence would be altered if it is held that the acts sanctioned in Section 20 of the Clayton Act can always be performed with immunity, regardless of whether their performance is done for lawful or criminal purposes. These activities of labor unions would thus be put on an entirely different basis from the rights of other classes of citizens who are subject to the rule "*Sic utere tuo ut alienum non laedas*"; they would be supreme over all other statutory safeguards or restrictions. All other rules as to torts and crimes would be *pro tanto* annihilated.

The defendants' contention is to the effect that the Clayton Act should be construed to operate *pro*

tanto as an implied repeal of all other constitutional or statutory provisions with which it may by an extended construction be made to collide. Such a result conflicts with the well recognized rule that repeals by implication are not favored. May we not go even further and say that repeals by implication are never to be countenanced when the two laws deal with different subjects?

U. S. v. *Tynen*, 11 Wall., 88.
U. S. v. *Babbitt*, 1 Black., 55.
Arthur v. *Homer*, 96 U. S., 140.
U. S. v. *Greathouse*, 166 U. S., 601.
U. S. v. *Claflin*, 97 U. S., 546.

There is another difficulty in the defendants' contention which in reality amounts to a constitutional obstacle. By their construction Section 20 declares that in *suits between employers and employees*, etc., involving conditions of employment, certain acts which otherwise are a part of the scheme to violate the Federal Anti-Trust Laws shall not be regarded as illegal. There is to be a radical change of law for the benefit of one class of litigants. Under such a construction, if this were a case wherein the plaintiff was suing a competitor who instigated and financed the union in carrying out the very acts which were done, then the complainant could recover. The same would be true if the complainant were a merchant injured by a secondary boycott prosecuted against a manufacturer. In either case it would not be a suit between employers and employees and the complainant could recover. It is only where an employer sues employees, etc., that immunity from certain laws of the United States is to be secured. In other words,

the identical acts would be illegal as between one class of litigants and legal as between another class. Is not a law clearly unconstitutional which provides that in suits between a certain class of litigants, none of the acts specified shall be "considered or held to be violations of any law of the United States"? Here is an improper direction to the judiciary—not declaring that such acts shall be legal when done in furtherance of an industrial dispute—but directing the Courts to declare them legal when a certain class of litigants is before them. If, however, the complainant's construction is adopted, which merely treats this statute as declaratory of the common law, this difficulty disappears.

This law should be construed in accordance with its purpose as shown by its legislative history, which is to end an alleged discrimination against labor and not to create a discrimination in its favor.

It may be contended as against this argument that the test of legality made in Section 20 is not the character of litigants; that the phrase at the end of the paragraph, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," applies to all litigants. If this closing phrase should be regarded as standing by itself unqualified by the opening words of the second paragraph relating to suits between employers and employees, then there would be no form of Federal crime or tort capable of commission by the performance of the acts specified which would not be sanctioned when committed through those acts. Such a construction would be contrary to the decision of the Circuit Court of Appeals for the Second Circuit in the *Lamar* case, and would give this statute the supreme authority

of impairing all other constitutional and statutory provisions, including such war legislation as the Espionage Act, the Sabotage Act, the Food Administration Bill, Lever Act and all military acts, as well as all of the acts already enumerated. The Government itself could not maintain any proceeding, criminal or civil, based on such activities, no matter how many statutes they would otherwise offend.

Altogether the defendants' contended construction meets with difficulties at every angle, and the only reasonable construction is to hold this law as declaratory of the common law and as asserting the legality of these peaceful acts *per se* when not done to attain unlawful ends.

There is still another constitutional objection to the construction contended for by the defendants. While it is true that laborers as "vendors of services" may be properly exempted from the application of such a law when confining themselves to their activities as laborers (*International Harvester Co.* v. *Missouri*, 234 U. S., 199), it does not follow that they can be constitutionally exempted when they attempt to control the sale and distribution of commodities. A valid exemption of labor organizations may be made on the ground that labor occupies a different relation to trade and commerce from that occupied by manufacturers and dealers, but when laborers put aside their peculiar relation to industry, which is the only basis for their exemption, and assert and exercise an interest and control of the same character as is exercised by manufacturers and dealers, then they must be subject to the same law. Laborers engaged in selling products cannot be exempted from the laws ap-

plicable to vendors of products, on the ground that they are laborers, and the same rule applies when, by the use of a trade-mark or union label, they assert an interest in articles of commerce and endeavor to restrain competition in the sale and distribution of competing articles. Any construction of the Clayton Act which would allow a labor union engaged in a manufacturing or mercantile business to escape the operation of this law on the ground that it was a labor organization, would be unconstitutional, and any construction which permitted labor unions to control the sale and distribution of commodities throughout the channels of interstate commerce would likewise make it invalid. In a case where the labor unions joined a combination with manufacturers to restrain interstate commerce it is constitutionally impossible that one should be held innocent and the other guilty. Can it be possible that if the Goss Company and the Hoe Company, competitors of the complainant, instigated this attack against us that they would be liable, while the unions which perpetrated the attack would be exempt? By the fundamental law of conspiracy each conspirator is responsible for all acts done by the other, so that if the employers under the terms of the Sherman Act, are committing a crime in furthering the common design, then the labor unions confederated with the employers must also be liable. By uniting with the employers in furtherance of this design they have eliminated differences between capital and labor which might otherwise permit exemption from this law.

The case of *Cleland* v. *Anderson*, 66 Neb., 252; 92 S. E., 206; 5 L. R. A. (N. S.), 136, was concerned with the construction of an anti-trust law

which exempted organizations of laboring men, and upheld the construction for which we are contending, while at the same time indicating that any other construction would destroy the validity of the statute. Concerning the statute, the Court said:

> "In its letter and spirit it refers only to combinations and conspiracies of persons engaged in the manufacture, sale and transportation of goods, wares and merchandise to prevent or hinder competition and regulate and control prices. No express exception of organizations of laborers intended to maintain or advance wages was necessary to exempt them from the operation. The section in question is inserted rather out of abundance of caution to prevent judicial extension of the terms of the act beyond its scope and purpose, than to grant a privilege or immunity to persons who would otherwise fall within its terms. The distinction between goods and merchandise produced by skill and labor and the skill and labor which produce them, is manifest and reasonable. The statute does not say that laborers who have goods, wares, merchandise, the product of labor, for sale, may combine to advance or control the price, but only that the law designed to prevent combinations in restraint of trade in such articles when produced, shall not be construed to affect organizations formed to regulate the wages or compensation of the labor and skill which produce them."

See, also:

Connolly v. *Union Pipe Co.*, 184 U. S., 540.

From these well-reasoned decisions it would seem to follow that an exemption from the anti-trust

laws extended to any class of people, *purely as a class*, is unconstitutional, if the exemption extends to that class under the identical circumstances where other classes are bound by the law. Laborers may be exempt from certain laws, because of their peculiar relation to the industrial situation, but when they depart from that relation by attempting to control the distribution of products, they come into the same situation as that occupied by merchants and manufacturers, and any law which relieves them from the restrictions of anti-trust statutes to this extent would be unconstitutional.

Moreover, notwithstanding the fact that the Fifth Amendment of the Federal Constitution expressly declares that no person shall be deprived of his property right without due process of law, and Section 2 of Article Three of that Constitution declares that the judicial power shall extend to all cases in law or equity arising under the Constitution and laws made in pursuance thereof, and to controversies between citizens of different states, Section 20, if given the broad interpretation, would deprive the individual owners of property and property rights of all right to resort to the Federal Courts of Equity for protection of the same, when assailed by any or all the acts specifically enumerated therein, by which acts such Courts have uniformly held that property and property rights may be unlawfully injured and destroyed.

A statute forbidding the Courts to issue any restraining order or injunction to prohibit the doing of such enumerated acts, however unlawful they may be, and however necessary such order or injunction may be to preserve the subject-matter of such litigation, would conflict with the statutes creating them and with the general law giving those

Courts equitable jurisdiction over such cases when the matter involved exceeds $5,000 in amount.

Such a law would violate not only the due process clause of the Constitution, but that other clause which declares that the judicial power of Federal Courts of Equity shall extend to all cases and controversies over which, by the statutes of their creation, they are given jurisdiction. For a statute to say that a court shall have equitable jurisdiction over a certain case or controversy, and then for another statute to deny it, the fundamental and essential power to issue and enforce the usual and necessary process required by that jurisdiction would be a direct invasion by Congress of the judicial department and void on that account.

B.

Decisions Affecting the Labor Provisions of the Clayton Act.

The decision of *Paine* v. *Neal*, 244 U. S., 459, supports the right to an injunction under the Clayton Act in a case like this. The final judgment of dismissal in that case was entered below and affirmed by the Circuit Court of Appeals before the Clayton Act was passed and a majority of this Court held that the rights of the parties were, therefore, concluded by the terms of the original Anti-Trust Law, and that no injunction could issue on the complaint of a private party under the original law. But a majority of that Court was also of the opinion that an injunction would issue in such case if the Clayton Act were applicable. In rendering the majority opinion, Justice Holmes, after stating that

an injunction could not issue under the original act, says:

> "Personally I lay those questions on one side because while the act of October 15, 1914, etc., establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning which satisfies me because upon this point I am in a minority."

The dissenting opinion clearly holds that an injunction should issue under the Clayton Act.

The case of the *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S., 229, is a decision in favor of the plaintiff. The injunction in that case could not have been sustained without supporting the construction of the Clayton Act for which we contend, since the very acts enjoined were of the nature which our adversaries claim may not be enjoined under Section 20 of that act. The fact that judgment had been entered in that case prior to the enactment of the Clayton Act is immaterial, as this Court, in passing upon the validity of an injunction in perpetuity takes account of subsequent legislation (*Penn.* v. *Wheeling Bridge Co.*, 18 How., 421, 431). This point was made clear by the Circuit Court of Appeals for the Ninth Circuit in the case of *Montgomery* v. *Pacific Ry. Co.*, 258 Fed., 383, where on page 338 the Court held that the defendants' contention in that case to the effect that the decision in the *Hitchman* case was based "upon the condition of the law existing at the time of its commencement and not upon the condition existing at the time of the decision, is wholly unsound. The exact reverse is manifestly untrue." The Court accord-

ingly sustained an injunction against labor in that case, which thoroughly supports our contentions.

In the case of *U. S.* v. *Rintelen*, 233 Fed., 793, 799, Judge Wolverton had before him this very question in a case where strikes were being instigated by peaceful means to prevent the exportation of munitions to the Allies. Judge Wolverton held that the combination violated the Federal Anti-Trust Law, and said:

> "It is suggested that some of the alleged means employed or to be employed, are sanctioned as lawful by the Clayton Act. But this does not help the defendants as a combination to effect an unlawful object through lawful means may constitute a conspiracy nevertheless."

The decision of the Circuit Court of Appeals on writ of error in the *Rintelen* case (*Lamar* v. *U. S.*, Fed., , certiorari refused by this Court), which is difficult to reconcile with its decision in the case at bar, deals with this same question as follows:

> "It is further contended that assuming everything covered by the evidence as proven, and all the legal rules above adverted to as correct, it still remains true that the only suggested means or method of restraining trade was to strike,—to induce laborers to peacefully quit work; and such acts are lawful under the statute of October 15, 1914, commonly known as the Clayton Act. It is said to follow that if doing this unlawful act should produce restraint of trade, the later statute prevents the operation of the earlier.
>
> Whether the Clayton Act has to the extent indicated nullified the Sherman Act, is a question that need not be discussed, but we

do hold it as clear that no change has been wrought in the law of conspiracy as applicable to this case.

It may be that where the intent of those who foment strikes, or themselves quit work after and as a result of agreement with their fellow-workmen, is to advance their own wage interests, or otherwise improve their conditions of life,—the Clayton Act produces legality by forbidding legal interference with their doings. This may be admitted for argument's sake, without expressing opinion. But we do hold that where it is charged (as here) that the intent was solely to restrain foreign trade, and where it is proved (as here) that the proposed instigation of strikes bore no relation whatever to the welfare of the strikers, then at most and best, the strike becomes nothing more than an instrument or means, legal in itself, but used only for an illegal end.

The argument for plaintiffs in error confounds the means with the end. The end or object of the proven conspiracy was not to call strikes, but to restrain or rather suppress foreign trade. *That object is as illegal as ever, the Clayton Act assuredly does not legalize it.* If that be granted, the elementary rules of law apply, and legality of means cannot excuse illegality of purpose or object."

In the case of *Alaska* v. *International Longshoremen's Union*, 236 Fed., 961, it was held that the rights or privileges given by Section 20 of the Clayton Act would have to be considered as qualified by the Interstate Commerce Act, and we see no reason why the same argument would not apply to the original Anti-Trust Act, which is in terms reaffirmed by the Clayton Act.

In the case of *The Pacific Coastal Trades Council v. American Steel Foundries*, 238 Fed., 728, which was decided over two years after the Clayton Act, the Court said:

> "Plaintiff's contention that a Court may restrain lawful acts of striking employees when committed and carried out the purpose of an unlawful conspiracy to destroy the employer's business, is supported by many authorities (156 Fed., 750; 158 U. S., 564; 252 Ill., 124; 165 Ind., 521). * * * If the purposes of the undertaking complained of were purely and simply or even primarily interference with the plaintiff in the control of its business as alleged, an act, however innocent in itself, directed to that end can be said to have a lawful purpose for its object."

In the case of *U. S. v. King*, 229 Fed., 505, it was urged that the association of the defendants was an agricultural association within the meaning of Section 6 of the Clayton Act, but the Court said:

> "Even if it were so I do not think that the coercion of outsiders by a secondary boycott which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal nor held to be combinations or conspiracies in restraint of trade, but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations."

See also:

U. S. v. King, 229 Fed., 275.

In the case of *Stephens v. Ohio State Telephone Co.*, 240 Fed., 758, Judge Killits, speaking of Section 20 of the Clayton Act, says:

> "The statute but enacted the position which courts had universally taken; there is nothing new in it," etc.

In the case of *Hood v. United Mine Workers*, 235 Fed., 1 (*United Mine Workers v. Coronado Co.*, 259 Fed., 899), a careful reading of the complaint, which is set forth at the end of the opinion, will show that the decision is based upon the theory that the Clayton Act has not changed the Anti-Trust Law in its application to labor unions so far as the substantive law is concerned. The opinion cites both of the decisions in *Loewe v. Lawlor* and reaches the conclusion, without referring to the question of violence, that the case falls within the class of restraints aimed at compelling third parties involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes.

The decisions of the lower courts in the case at bar seem to be the only ones upholding the defendants' contentions, while there are a number of decisions, as indicated, both in this and inferior courts, which conflict with any such conclusion.

C.

History of the Labor Sections of the Clayton Act.

Judge Hough, speaking in behalf of the Circuit Court of Appeals, held that "in so far as courts are permitted to study legislative proceedings and contemporary history for aid in statutory interpre-

tation we consider it plain that the designed, announced, and widely known purposes of Section 20 (perhaps in conjunction with Section 6) was to legalize the secondary boycott. At least in so far as it rests on or consists of refusing to work for anyone who deals with the principal offender."

This statement of the Court, which constituted at least one of the principal reasons for its conclusion, is contrary to the actual facts as disclosed by the history of this legislation, the evil sought to be remedied thereby, and the acts and declarations of those who have a responsible part in its enactment.

When a statute not clear on its face is to be interpreted courts will consult legislative debates, reports and contemporaneous history for expressions indicating the intentions of the legislative body.

Tap Line R. R. Cases, 234 U. S., 27.

Why was it thought necessary or advisable to enact this section? It was because the leaders of organized labor had been asserting for years that a different rule of law was applied in the suits enumerated in the first sentence of Section 20 than in other suits, that acts which would be held innocent in any other case were held unlawful in such cases, and that they were discriminated against thereby. They had filled the whole country with their complaints. Whether they really believed this to be true or not it would take an expert in psychiatry to decide, but by incessantly and constantly asserting it they led a great many others, including some senators and members of Congress, to believe it to be true, and had thereby created a great prejudice against the Federal courts in a large section of the public mind.

In response to this propaganda several bills were introduced (in the Fifty-second Congress, H. R. 6640, Sec. 1; Fifty-sixth Congress, Senate 1,546, Sec. 8; H. R. 10,539, Sec. 7; Fifty-sixth Congress, H. R. 11,667, Sec. 7; Fifty-seventh Congress, Senate 649, Sec. 7; H. R. 14,947, Sec. 7;) *to amend the Sherman Anti-Trust Law so that it would not apply to labor organizations, and while one of these (H. R. 10,539, Sec. 7) passed the House in the Fifty-sixth Congress, none ever became a law. In February, 1908, Chief Justice Fuller, delivering the unanimous opinion of the Court in Loewe v. Lawlor,* 208 U. S., 291, had said:

> "Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us."

Session after session, before and after the decision in *Loewe v. Lawlor*, the labor unions had gone to Congress with their complaints against what they declared to be alleged discrimination and had demanded the removal of this discrimination by legislation which would relieve them from the operation of the law. They had frequented the halls of national conventions of all parties, demanding that this complaint be made an issue of campaigns for the election of presidents, senators and congressmen. Finally the Democratic Party in its national conventions of 1908 and 1912 inserted a clause rela-

tive to this complaint in its national platform by the following plank:

> "Questions of judicial practice have arisen especially in connection with industrial disputes. We believe that the parties to all judicial proceedings should be treated with rigid impartiality and that *injunctions should not issue in any cases in which injunctions would not issue if no industrial dispute were involved.*"

This plank originated in no hostility to or lack of respect for the courts, nor in any desire to cripple them. For the convention took the pains to further declare in connection with it:

> "The courts of justice are the bulwark of our liberty and we yield to none in our purpose to maintain their dignity. Our party has given to the bench a long line of distinguished judges, who have added to the respect and confidence in which this department must be jealously maintained. We resent the attempt of the Republican party to raise false issues respecting the judiciary. It is an unjust reflection upon a great body of our citizens to assume that they lack respect for the courts."

This plank is the pole star by which we should be guided in construing Section 20 of the Clayton Act, for its authors declared again and again that they were carrying it into effect by the language which they employed.

There is no mistaking its meaning. "Questions of *judicial practice* have arisen, *especially in connection with industrial disputes.* Parties to *all* judicial proceedings should be treated with rigid impartiality. Injunctions should not issue *in any cases* in which injunctions would not issue, if *no*

industrial dispute were involved." It was such a declaration as was to be expected from the national convention of a party, whose founder had said in his first inaugural address, "It is proper you should understand what I deem the essential principles of our government, and consequently those which ought to shape its administration, *equal and exact justice to all men of whatever state,* or persuasion religious or political; * * *. These principles should be the creed of our political faith, the text of civic instruction."

Its complaint was not of *unequal or unjust laws,* but of the unequal *administration of those laws by the courts.* No change in the *substantive law* was recommended or suggested. It was the *practice and procedure* of the courts which was to be corrected, so that the same practice and legal construction and remedies should be applied in all suits, whether they grew out of industrial disputes or not. All parties to suits were to be under the same laws, all were to be treated alike in the courts, all were to have the same remedies. It sanctioned no proposal to exempt certain classes from the operation of the law while others were included; to punish one and release another for the same act; to say that all are not equal before the law. Especially did it not suggest or express any intent that the laws should be so changed as to render workmen pariahs or slaves and employers bankrupts or commercial slaves.

During this same period the leaders of organized labor also set up the claim that under the *Hatters'* decision labor unions *per se* were unlawful combinations in restraint of trade, irrespective of what their practices might be, and they demanded legislation to correct the law as so laid down by

this Court. They further claimed that when the Sherman Law was enacted in 1890 it was never intended "*to apply*" in any way to labor unions and their practices, notwithstanding the decision of this Court to the contrary, and they demanded that the Sherman Act be amended accordingly. Upon these points they also went to the national conventions of all the political parties and demanded the insertion in their platforms of a plank, directing that labor unions be exempted in all respects from the operation of the Sherman Act.

The Democratic national convention thereupon, in its platforms of 1908 and 1912, inserted in its platform the following plank, embodying only the first demand:

> "The expanding organization of industry makes it essential that there be no abridgment of the right of wage-earners and producers *to organize* for the protection of wages and the improvement of labor conditions, to the end that *such labor organizations shall not be regarded as illegal combinations in restraint of trade.*"

With these planks in its platform the Democratic Party was successful in 1912, and in 1913 it came into full control of both the executive and legislative branches of the Government. In course of time the judiciary committees of both Houses in succession reported the Clayton Act (House Rep. No. 627, 63rd Cong., 2nd Sess., pp. 2, 14-16; Senate Rep. No. 698, 63rd Cong., 2nd Sess., pp. 1, 10, 46).

The Senate Judiciary Committee in its report said:

> "It is well, at the outset, to state the theory of the bill, both as it passed the House of Representatives and as it is proposed to be

> amended, for the general scope of the House measure is unchanged. It is not proposed by the bill or amendments to alter, amend or change in any respect, the original Sherman Anti-Trust Act of July 2, 1890. The purpose is only to supplement that Act and the other Anti-Trust Acts referred to in Section 1 of the bill."

And the Senate Committee also quoted from the report of the House Committee to the same effect, as follows:

> "The bill does not interfere with the Sherman Anti-Trust Act at all; it leaves the law of conspiracy untouched and it is not open to effective criticism on any constitutional ground."

The opening sentence of Section 20, which specifies the classes of cases to which its subsequent provisions apply, was adopted verbatim, with one momentous alteration, from the first section of the famous Pearre Bill, which was first introduced in the 59th Congress in April, 1906, and in every succeeding congress, including the 63rd, and was the subject of frequent debates at every session. In the Pearre Bill the language was as follows:

> "Be it enacted, etc. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and an employee, or between employers and employees, or between employees, or between persons employed to labor and persons seeking employment as laborers, or between persons seeking employment as laborers, *or* involving or growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property or property rights," etc.

In the opening sentence of Section 20 of the Clayton Act this language was changed by the omission of the word "*or*" between the words "employment" and "involving or growing out of a dispute concerning terms or conditions of employment," so that Section 20 of the Clayton Act reads thus:

> "That no restraining order or injunction shall be granted by any court of the United States or a judge or the judges thereof *in any case between* an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, *involving or growing out of a dispute concerning terms or conditions of employment*, unless necessary to prevent irreparable injury to property or to a property right," etc.

The effect of this change in the scope of the provision, by the omission of the word "or," was repeatedly pointed out in the debates, and it was often asserted and never denied that the effect and intent of the change was to confine the operation of the provisions of the section, precisely as Judge Hough says they would be confined, if the narrow construction which he rejected was adopted (see the acute discussions in the House debates on this paragraph of the change in the meaning and scope of this Section 20, then Section 18 of the bill, by the omission from it of the word "or" [Cong. Rec., Vol. 51, Pt. 10, pp. 9,651-9,658, 63rd Cong., 2nd Sess.]). For instance, Congressman Madden, of Illinois, in discussing the matter, said (Cong. Rec., Vol. 51, Pt. 17, Appendix, p. 942, 63rd Cong., 2nd Sess.):

> "But anyone can see the wide range of cases covered by the clause 'or involving or

growing out of a dispute,' and so forth, and can also see the far-reaching effect of omitting in this Section 20 the words 'or,' with which it is introduced. The effect is to change the clause from a provision creating an almost limitless class of cases which the exemption from injunction process would have embraced, to a clause qualifying a class of cases which was already almost purely theoretical and speculative. The Section as enacted can never be available or afford any relief after the relation of employer and employes has been severed or terminated by a strike or lockout, and it is then, if ever, that protection against arbitrary injunctive and restraining orders is needed. No one ever heard of the power of the court being invoked to protect by injunction anyone against another prior to the severance of relations, nor did anyone ever hear of employers or persons out of employment, or seeking employment, applying for an injunction against each other. Much less are any of those holding such relations or seeking employment ever likely to apply for an injunction to protect property or property rights, and each of these phases or elements must be present as conditions precedent to the operation of the prohibition against use of injunctive process as found in Section 20. In other words, no area or space of jurisdiction is covered by it for any practicable purpose when the limitations are considered and given effect."

The intent of these sections in the opinion of the President of the United States, who signed the act, and by his approval made it a law, was *announced* at the time by him through the press and by it spread broadcast throughout the country and widely read in every hamlet (Cong. Rec., Vol. 51, Pt. 10,

pp. 9,592, 9,593, 63rd Cong., 2nd Sess., June 1st, 1914).

Mr. Thompson of Oklahoma made this clear in the following:

> "Mr. Chairman, I voted for the Thomas amendment this afternoon to the anti-trust act, and I want to call attention to the report that is carried this afternoon in the *Evening Star* of an interview with the President which confirms me in the view that I took at the time when I voted for the Thomas amendment. I did not believe that the Webb amendment was broad enough to exempt labor and farmers' organizations from the terms of the anti-trust act. The *Star* carries this report, in talking about its interview with the President:
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> > 'He was asked numerous questions as to pending legislation and especially as to the amendments to the Clayton bill touching upon the exemption of labor unions from the operation of the Sherman Anti-Trust Law. *He does not believe that the amendments agreed upon by the administration and Congress give the exemptions mentioned. On the contrary, he thinks that there is no more immunity for labor and farmers' organizations as far as violations of the law are concerned, than any corporation or other organization.*"

The amendments "*agreed upon by the administration and Congress*" mentioned in the above interview, were the two amendments offered by Mr. Webb, Chairman of the Judiciary Committee, in its behalf, and adopted by the House on June 1, 1914, and June 2, 1914, respectively (Cong. Rec., Vol. 51, Pt. 10, pp. 9,566 and 9,662, 63rd Cong., 2nd Sess.).

The first amendment was to add at the end of Section 7 (now Section 6) the words, "nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." And the second amendment was to add to Section 20 (then Section 18) the words, "nor shall any of the acts specified in this paragraph be considered or held to be unlawful."

When the bill was before the House, Mr. Webb, Chairman of the Judiciary Committee, and in charge of the bill, speaking for the Committee, declared over and over again in the debate on Section 20 (then Section 18) that it was not intended to, and in the opinion of the Committee did not, legalize the secondary boycott. For instance (Cong. Rec., Vol. 51, Pt. 10, pp. 9,652, 9,653, 9,658, 63rd Cong., 2nd Sess.), when speaking for the Committee, he discussed the effect of the words "nor shall any of the acts specified in this paragraph be considered or held unlawful," upon the preceding clauses of the paragraph he was asked this question by Mr. Volstead:

> "Mr. Volstead: Would not this also legalize the secondary boycott * * *. Can there be any doubt this is intended or does, in fact, *legalize the secondary boycott?*
>
> Mr. Webb: I will say frankly to my friend, when this section was drawn, it was drawn with the careful purpose *not to legalize the secondary boycott, and we do not think it does.* There may be a difference of opinion about it, but *it is the opinion of the committee* that it does not legalize the secondary boycott and is not intended to do so. * * *
>
> Mr. Towner: Is it not true, I will ask the gentleman, if these statements, every one

of them contained in this paragraph of this section, have been time and time again declared by the supreme courts of the United States not to be illegal or unlawful acts?

Mr. Webb: Not time and time again by the Supreme Court of the United States, but time and time again by various inferior federal courts and the Supreme Court.

Mr. Towner: By the supreme courts, I said.

Mr. Webb: Mr. Chairman, we are frank to say in our opinion *everything set forth in Section 18 is the law to-day.*

Mr. Volstead: But would the gentleman be willing to accept an amendment which would expressly exclude the secondary boycott?

Mr. Webb: Well, with our present view and understanding of the section we feel it is not necessary to accept such amendment. • • • I will say this section was drawn two years or more ago and was drawn carefully, and those who drew this section drew it with the idea of excluding the secondary boycott. It passed the House, I think, by about 213 to 16 and the question of the secondary boycott was not raised then because we understood so clearly *it did not refer to or authorize the secondary boycott.* • • •

I say again—and I speak for, I believe, practically every member of the House Judiciary Committee—that if this Section did legalize the secondary boycott *there would not be a man vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it.*"

Mr. Henry, of Texas, immediately followed Mr. Webb and gave this account of the genesis of the amendment which Mr. Webb had offered and ex-

plained (Cong. Rec., Vol. 51, Pt. 10, p. 9,653, 63rd Cong., 2nd Sess.):

"Mr. Henry: Mr. Chairman, I regard this as a very important amendment. Section 18 may be truly regarded as a bill of rights for the labor organizations. This bill was passed through the House before. This section as a separate bill was held up in the Senate. I am glad we are now about to make it a part of the anti-trust program.

Some of us, after reading this section in connection with the other provisions of the general bill, did not believe that it was quite explicit, and that there ought to be some additions to Section 18. So, on the evening of May 21 of this year, Mr. Kitchin, of North Carolina; Mr. Towner; Mr. Hinebaugh, of Illinois; Mr. Graham, of Illinois; Mr. Lewis, of Maryland; and myself met in the room of the Committee on Rules for the purpose of examining this section and certain other sections of the bill, and we came to the conclusion that this amendment which has been offered by Mr. Webb, and accepted by the Committee on the Judiciary, should be made a part of the bill.

On that evening we formulated this amendment exactly as it has been tendered, and on Sunday morning submitted it to the American Federation of Labor, because we did not want any misunderstanding about this question. We believed that we ought to make its history clear; that there ought not hereafter to be any cloudy or foggy history as there was after the Sherman Anti-trust law was passed. So in connection with the amendment which was agreed to as a part of Section 7, this amendment was agreed to, and we asked the officers of the American Federation of Labor to submit this amendment to their counsel in order that we might

clearly understand it and cooperate with them.

They did so, and they have agreed that this amendment is appropriate and indeed necessary; and we concur with them and the *President and the Committee on the Judiciary has concurred with them, and for a very good reason.* Section 18, as originally drawn in connection with the other parts of this bill should be amended in this respect.

Section 18, in connection with other parts of the bill, only referred to the *equity powers of the courts*, and we thought that it ought to go further, and that there should be an amendment saying that the things mentioned in Section 18, if they were done should not *be illegal*, not only as far as the equity courts were concerned, but that *no court* should be able to lay its hands upon the members of the organizations *touching the rights* guaranteed in Section 18.

Mr. Graham of Pennsylvania: I understand the gentleman to say that this has been submitted to the Committee on the Judiciary and approved by it. If so, I would like to know when and under what circumstances?

Mr. Henry: I presume it was. It was submitted to the subcommittee. I have not been in attendance on the meetings of the committee, but suppose it was submitted to the members of the general committee. But this amendment is satisfactory to the American Federation of Labor; *it is satisfactory to the President of the United States;* and was and is *satisfactory to the chairman of the Committee on the Judiciary* and the members thereof with whom I have talked; and it ought to be added at the end of Section 18 so as to preserve, protect, and perpetuate the rights that are given to labor organizations in Section 18, and not only

> prohibit *courts of equity* from violating *those rights* but also restrain the *courts of law* from undoing any of those things that we have guaranteed in this section.
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> * * * * * *
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> I am not going into any controversy with them; but the fact remains that the Judiciary Committee had drawn their sections, 7 and 18, and they were not satisfactory, and we were trying to get together with the Judiciary Committee and shape up this matter so as to prove our friendship for the labor portions of this country and *carry out our platform demands.*"

Those "platform demands" were "that *all parties to all proceedings should be treated with rigid impartiality*, and that injunctions should not issue in any cases in which injunctions would not issue if *no industrial dispute were involved.*" No attempt or suggestion was made by Mr. Henry or anyone else in the House or Senate to remove the limitations on "the acts specified in this paragraph," which had been so studiously inserted to make the prohibitions of the section accurately express and conform to the purpose of the platform demands, to wit, "*acts which might lawfully be done in the absence of such dispute by any party thereto.*" The section passed the House with these qualifying words in it, with Mr. Henry's amendment tacked on, and was referred to the Senate Judiciary Committee.

But there was a dead fly in the ointment and the able lawyers on the committee soon detected its presence. It grew out of the use of the word "unlawful" in the very amendment which Mr. Henry had worked day and night and Sunday to frame and put through in order to perfectly clarify this

section for all time. It was found that, instead, he had hopelessly muddled the whole business. They perceived that under our dual form of government the power to declare lawful or unlawful the acts "specified in this paragraph" in most instances rested with the states and not with Congress, and that the Federal courts, both of equity and law, sit to administer the State laws as well as the Federal laws in all cases of which they have jurisdiction. The effect of the word "unlawful" in the amendment, therefore, was that Congress was ordering the Federal courts of law and equity to construe the state laws according to its direction. They therefore reported the section with an amendment, striking out the word "unlawful" and inserting in place of it the words "violations of the anti-trust laws," which was changed in the Senate to "violations of any law of the United States," and so it stands in the section today.

While the bill was before the Senate, after the Senate Judiciary Committee had reported amendments to it, designed as they said in their report to emphasize the fact that it was not intended to make anything legal which was illegal before, but to merely codify the law, Mr. Hughes, of New Jersey, a member of labor unions and their recognized champion in the Senate, said this (Cong. Rec., Vol. 51, Pt. 11, p. 13,977, 63rd Cong., 2nd Sess.):

> "Mr. Hughes: I have said a good deal more than I intended to say, Mr. President. I think this is a timely compliance with the just and reasonable demands of the laboring people of this country. *In my judgment there is nothing in this section which justifies the secondary boycott or a boycott of any kind.* It simply makes legal that which we

all have been taught to believe was legal. It simply interposes the barrier of the arm of this law before an unfriendly Attorney General, who might with great reason and force, it seems to me, go into a court of equity and dissolve by injunction every organization of railroad trainmen, firemen or engineers who were organized for the purpose of simultaneously ceasing their employment whenever necessary to enforce their demands. That is all it does in my opinion."

Senator Jones, of Washington, in the course of a very strong speech in support of the bill, explained the purpose and effect of the measure as follows (Cong. Rec., Vol. 51, Pt. 14, pp. 14,011, 14,013, 14,014, 63rd Cong., 2nd Sess.):

"Mr. Jones: Mr. President, I have received hundreds of telegrams of the following tenor:

'We earnestly protest against the passage of that section of the Clayton bill exempting labor and agricultural organizations from the provisions of the Sherman law. Such exemptions we deem class legislation of the rankest kind. We therefore hope that you will use your best efforts to defeat the same.'

I have also received hundreds of telegrams of this effect:

'The tenth convention of District No. 10, United Mine Workers, assembled in Seattle, request the passage by the senate of the Clayton House resolution exempting farmers and labor organizations from the operation of the Sherman anti-trust law.'

Those who send these telegrams believe that section 7 of this proposed law exempts

farmers' and laborers' organizations from prosecutions under the Sherman law for acts done in undue restraint of interstate commerce. Both are mistaken. It does nothing of the kind, and when the section is clearly understood there will be no objection to it anywhere in the country, in my judgment, unless the members of the organizations referred to should object to it on the ground that it does not go far enough. Those who so violently oppose it will see that it does not at all do what they think it does. Those who favor it may find that it does not go nearly so far as they believe or desire.

It is unfortunate that in the discussion of cases arising under the Sherman Anti-trust Act many misstatements have been made, and the effect of decisions has been misrepresented either intentionally or ignorantly and carelessly. This has given rise to much misapprehension as to the effect of and operation of this law regarding labor and farmer organizations. Many misstatements have been so often repeated as to be accepted as facts. Prosecutions for acts done outside of the objects and purposes of such organizations and in a manner contrary to the legitimate purposes thereof have led to charges and misstatements that prosecutions have been made against these organizations as such, and that their legitimate objects have been interfered with. This has been done so persistently that the members of these organizations have come to believe that their organizations, as such, have come under the ban of the Sherman law, and that the courts have without warrant held them to be contrary to that law. This has led others very naturally to conclude that legislation urged by such organizations and proposed in their behalf is intended to give to such organizations and their members some

special privileges, and to permit them to do and commit acts contrary to that law, and they have very naturally concluded that this proposed law does this. They have concluded that this legislation will make legal certain acts done by these organizations which if done by other organizations or persons would be illegal. The courts have not held these organizations illegal; they have not held that the mere fact of the existence of such organizations showed that the Sherman law had been violated. Some isolated cases in inferior courts may have gone this far, but no authoritative court has done so. On the contrary, the courts of last resort have uniformly held that such organizations are not in themselves illegal, but are entirely lawful. In my judgment, the criticism that has been leveled at the courts for holding such organizations to come within the terms of the Sherman law when acts have been committed in undue restraint of interstate commerce has been most unjust.

* * * * * *

Sec. 7 of the bill before us reads as follows:

'Sec. 7. That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust law.'

Those really interested in this provision are the labor organizations of the country. They want it; they believe they ought to have it; they believe they need it. This is not class legislation. It does not permit labor to restrain trade or commerce while prohibiting others from doing it. Capital can combine; it can and does organize now, and no one complains unless it does actually restrain trade, and often not then. A mere commercial combination may in itself be a restraint of trade, and therefore in violation of the law and its continuance a continued violation of the law. An association or organization of laborers cannot in and of itself be a restraint of trade. It is not a combination or association of anything entering into trade and commerce. Trade and commerce are made up of articles or commodities; not of labor, but the products of labor. Combinations of capital control commodities or the instruments of commerce; combinations of labor are simply the association of human beings. Legislation for the regulation and control of the one may be no more suitable for the regulation of the other than would legislation for the control of a flying machine be suitable for the control of railroad trains.

In my judgment, this provision does not give to labor a single right that it does not now possess. This provision simply says, in effect, that the existence of labor organizations is not unlawful; that their operations for mutual help are legal; that the lawful efforts of their members to carry out their legitimate objects is not forbidden; and that such organizations are not *per se* in restraint of trade nor their members as such conspirators in restraint of trade. All this, in my judgment, is lawful now. I do not believe that any decision of any court can

be found where it has been held that a labor organization, independent and apart from acts done by its members, is simply by virtue of its formation and existence a combination in violation of the Sherman law. No court of last resort has held that labor, in the absence of contract, cannot quit work either singly or in a body, and for any reason whatever, or for no reason, and regardless of the consequences to private or public interests. The right to do so is an inherent right and its exercise is superior to the rights of the individual or the public, and the court cannot inquire into the consequences of the exercise of such rights with a view to preventing it.

* * * * * *

This provision gives no more than this. Why pass it? What is its purpose? It is to set at rest in an authoritative way by legislative enactment any doubt that may exist as to these rights of labor, or rather to set at rest this one question, to wit, whether a labor organization is *per se* a combination in violation of the Sherman law, and therefore liable to dissolution irrespective of what it or its members may do. Some able lawyers have held that it is so liable to dissolution, and labor thinks they may be right, and this provision sets at rest that doubt. Surely no one who understands this will object to such legislation, and those who have protested against this section will most surely approve its passage when they understand it. In other words this provision is no more and no less than a legislative declaration of existing law as enunciated by the courts."

Mr. Volstead, an opponent of the bill, when criticising the measure in the debates on the adoption of the conference report, *alone* ventured the opin-

ion that its effect would be to legalize the primary and secondary boycotts, but he hastened to say *that the sponsors for the bill denied this.* He was a member of the House Judiciary Committee which reported the bill, and was also one of the House conferees on the disagreeing votes between the two houses, and took part in the debates on the acceptance of the report of the conferees. Surely what he said ought to throw light on the meaning and intent of those who supported the bill if it is permissible for the Court to read the debates for light on the subject. He said (Cong. Rec., Vol. 51, Pt. 16, p. 16,284, 63rd Cong., 2nd Sess.):

> "Mr. Volstead. There is another feature of this section that may be worth noticing. It certainly authorizes both the primary and secondary boycott, but it also authorizes the blacklist on the part of employers. I presume one was intended to offset the other. I am not prepared to say which will be the most effective weapon of warfare. *Those who stand sponsors for this bill claim that it neither authorizes the one nor the other.* They claim that the bill does not change existing law in regard to labor except that it prevents courts from declaring labor organizations illegal and gives a jury trial when an injunction has been violated. There is absolutely no question as to the legality of labor organizations. Such organizations have been repeatedly held by the highest court of our land to be legal. The bill adds nothing in that respect. Nor is it certain that it grants a jury trial in contempt cases. Courts now have the power to submit questions of fact in such cases to a jury. Under the language of this bill why is it not optional with the court whether it will submit any such question to a jury?"

Mr. Volstead evidently receded from his solitary assertion that Section 20 authorized both the primary and secondary boycott, for he incorporated in his remarks an analysis of this and other sections (see Cong. Rec., Vol. 51, Pt. 17, Appendix, pp. 1156, 1157, 1158, 1159, 1160 and 1161) of the Clayton Act, from which we quote, at page 1158:

> "But section 20 of the Clayton bill calls for special remark, for it is said to be that section which constitutes 'labor's bill of rights.' It singles out for special treatment from the vast field of cases which, by the Constitution and laws of the United States, the Federal courts have jurisdiction over those only which are between employers and employees, or between employees, or between persons employed and persons seeking employment where such relations actually exist at the time suit is brought and an injunction is applied for, which suits involve or grow out of disputes concerning terms and conditions of employment.
>
> "Suits between parties who previously sustained those relations but have ended them, and suits between either of said parties and outsiders are not covered by this section. Suits between an employer and his ex-employees who have struck and boycott cases generally are excluded from this section. Apparently also the class of cases to which the section relates is still further limited by being confined to suits between the specified parties, brought to prevent irreparable injury to tangible property or property rights, because the application for an injunction in the specified cases must describe 'with particularity' the property or property rights to be protected by the injunction. But whether this last limitation on the class is intended or not, it is clear that suits to protect other rights between

such specified parties and outsiders to protect property or other rights, and suits between parties who have previously sustained the relations specified but have terminated them, are not included in the prohibition against the issuance of injunctions addressed to the Federal courts in this section. The legislative history of this section shows that these exemptions were intentionally made.

"And in the very limited class of cases to which the prohibitions of the section are confined by its terms, what are the acts which the Federal courts are prohibited by this section from enjoining? They are any act or acts which might lawfully be done in the absence of such dispute, including the lawful termination of the relation of employment, the lawful recommending, advising or persuading others by peaceful means to terminate employment, the lawful attending at any place where it is lawful to be for the purpose of peacefully obtaining or communicating information, the lawful peaceful persuasion of any person to work or to abstain from working, the lawful ceasing to patronize or employ any party to such dispute, and the lawful recommending, advising, or persuading others by peaceful and lawful means so to do, the lawful paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value, and the lawful assembling in a peaceable and lawful manner. It is these acts which the Federal courts are forbidden to enjoin in the limited classes of cases specified in this section, and which 'shall not be considered or held to be violations of any law of the United States.'

"Since the injunctive power of the Federal courts of equity has always been limited to the prevention of irreparable injury

from unlawful acts, it will be at once seen that this section does not change in the least the existing law, that it is merely a legislative construction of the law as already declared by the courts, and that 'labor's rights,' like those of anybody else, are secured to it not by this section, but by the Federal and State constitutions and laws of long standing passed in pursuance of both. The section merely provides that in the specified suits between the parties named, acts which would be lawful when no 'dispute concerning terms and conditions of employment' existed between them shall not be enjoined or considered or held to be violations of any law of the United States.

"That this is what the section means is shown by the history of the times, to which the courts will look in construing it. It was passed by a Democratic Congress in literal performance of the following platform pledge of the Democratic Party in 1908 and repeated verbatim in 1912.

> "'Questions of judicial practice have arisen, especially in connection with industrial disputes. We believe that the parties to all judicial proceedings should be treated with rigid impartiality, and that injunctions should not issue in any cases in which injunctions would not issue if no industrial dispute were involved.'

"This declaration, it is well known, was inspired and, perhaps, was drawn by Mr. Gompers, who has never ceased for the past 10 years to assert before committees of Congress and in public addresses everywhere and in the magazine of which he is the editor, that precisely that discrimination by the Federal courts existed, and that what he demanded was that it should be legis-

lated against, until he had caused multitudes to believe it was true, and perhaps had come to believe it himself.

"That this is the meaning of the section is also shown by its legislative history. The reports of the committees and even the debates in Congress show that there was no intention of legalizing anything which was then illegal, but only to legislatively declare what was then legal. That the several acts specified in this section might be unlawful under certain circumstances was not denied, and the principles laid down by the Supreme Court in *Aikens v. Wisconsin* (195 U. S., 194) were recognized.

> "'No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if a step in a criminal plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.'

"That this is the meaning of the section is also shown by the fact that, if it had been the intention of Congress thereby to amend the existing statutes of the United States, it would have repealed thereby the civil service laws prohibiting the discharge, without cause, of the 200,000 employes in the various departments of the Government, the most vital provisions of the interstate-commerce act, both as to the carriers and their employees in doing the work imposed upon them by it, under severe penalties, and the Sherman Antitrust Act, both as to employers and employees, which act the committees declared that they had left unchanged by the Clayton bill.

"That this is the meaning of the section is further shown by the fact that, any other construction of it would render it plainly unconstitutional, and the courts in construing it will not assume that it was the intention of Congress to pass laws that are invalid. The laws creating the courts of the United States give them general jurisdiction, concurrent with the courts of the several States, of all cases, at law or in equity, where the matter in demand exceeds $3,000 in amount, arising under the laws of the United States, and of controversies between citizens of different States of like amount. And the fifth amendment of the Federal Constitution expressly declares that no person shall be deprived of his property without due process of law. Under the Constitution and laws of the United States citizens, who are parties to the several suits mentioned in this section, have the inalienable right to resort to the Federal courts of equity for protection of their property, when assailed by any or all of the acts specifically enumerated therein, since by such acts such courts have heretofore uniformly held that property and property rights may be unlawfully injured and destroyed. Congress could not by a legislative fiat declaring that the injurious acts destructive of property were not unlawful, deprive them of their property. It would violate the fifth amendment of the Federal Constitution. Such a construction would also render the section invalid, because it would invade the judicial power of the Federal courts of equity, which the Constitution declares shall extend to all cases and controversies over which, by the statutes of their creation, they are given jurisdiction. For a statute to say that a Court shall have equitable jurisdiction over a certain case or controversy, and

> then for another statute to deny it, the power to judicially construe previously existing statutes, and also the fundamental essential power to issue and enforce the usual and necessary process required by its jurisdiction, would be a direct invasion by Congress of the judicial department of the Government and totally void."

When the bill was in the House, Mr. Webb, of North Carolina, then Chairman of the House Judiciary Committee, and the member in charge of the bill, offered, in behalf of the Committee, an amendment to the present Section 6 of the Act, then Section 7, to add to the section the words following:

> "Nor shall such organizations, orders, or associations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the Antitrust laws."

The purpose and effect of this amendment, which was later adopted and remains in the Act as it is today, were fully discussed by Mr. Webb and other members of the Committee, and by Mr. Henry, of Texas, Chairman of the all-powerful House Committee on Rules; Mr. Thomas, of Kentucky, and Mr. MacDonald, of Michigan.

Cong. Rec., Vol. 51, Pt. 10, p. 9540, 63rd Cong., 2nd Sess.:

> "Mr. Webb. Mr. Chairman. The amendment which is under consideration is, in the opinion of the committee, in keeping with the declaration of the Democratic platform —to the effect that labor organizations and farmers' organizations organized for mutual

help shall not be considered or construed to be illegal combinations or conspiracies in restraint of trade under the Antitrust laws.

It is needless to say that we have had much diversity of opinion in adopting and agreeing on this particular section, but after all, Mr. Chairman, we have embodied in this amendment what we understand to be the best legal interpretation of the best judges in the United States.

Personally I have never had any idea that the existence and operation of labor organizations, of farmers' unions, or fraternal orders were ever intended to come within the provisions of the anti-trust law. However, some labor leaders have contended for many years that labor organizations have their existence as a matter of sufferance and at the whim of the attorney general, and if suit should be brought, if they were not dissolved entirely, much trouble could be given them. We are therefore writing into the statutes of the United States the concensus of opinion of the best judges of the country on this troublesome question. I have not had the opportunity of reading the opinion, but only last Friday the Circuit Court of Appeals of the Fourth Circuit at Richmond, Va., held that a labor organization was not a conspiracy or combination in restraint of trade. *Therefore we say that we have embodied in this section as set forth in the first part of Section 7 and expressed in the latter part of this amendment which I now offer what is generally understood to be the law and should be the law in the United States with reference to labor organizations, as well as fraternal and farmers' organizations. Applause.*"

Cong. Rec., Vol. 51, Pt. 10, p. 9567, 63rd Cong., 2nd Sess.:

"Mr. Murdock. From the debate I will say to the gentleman that there is a great difference of opinion as to just what his amendment does. I do not think, and I do not think the gentleman thinks, that it goes as far as that amendment offered by the gentleman from Kentucky (Mr. Thomas) and that amendment offered by the gentleman from Michigan (Mr. MacDonald); and I would like to ask the gentleman from North Carolina this, and then I will take my seat: Did the Committee on the Judiciary intend the Webb amendment to exempt organized labor from the provisions of the Sherman Anti-trust Law?"

"Mr. Webb. It certainly does exempt their existence and operation if organized for mutual help and without profit."

"Mr. Murdock. Does it say anything——"

"Mr. Webb. We wanted to make it plain that no labor organization or farmers' organization organized for mutual help without profit should be construed to be a combination in restraint of trade or a conspiracy under the anti-trust laws. Now, I will say frankly to my friend that *we never intended to make any organization, regardless of what they might do, exempt in every respect from the law. I would not vote for any amendment that does do that.* (*Applause.*)"

"Mr. Murdock. If the labor organization goes beyond the province of mutual help, then is it subject to the Sherman Anti-trust Law?"

"Mr. Webb. If it violates the law, it is, of course, it is an organization subject to the law, and I ask if my friend from Kansas would vote to exempt it from all laws?"

"Mr. Murdock. I would vote to exempt it from being confined under the anti-trust laws to mere inactive existence."

"Mr. Webb. But the gentleman would not vote to exempt it and nobody else from all laws?"

"Mr. Murdock. I understand that but I would give strikers the right to peaceful assemblage."

"Mr. Webb. We give them that right in this bill."

Cong. Rec., Vol. 51, Pt. 10, p. 9540, 63rd Cong., 2nd Sess.:

"Mr. Henry. Mr. Chairman, there has been so much controversy about what was intended when the original Sherman Anti-trust law was passed that I think we should make clear just what we intend by this law. Some of us did not believe Section 7 as originally written by the Committee on the Judiciary expressed exactly what should be in this bill. Therefore we took exception to the language of the first part of the paragraph in Section 7 and insisted that there should be additional language. Among those who agreed that the language was not plain enough were the gentleman from North Carolina, Mr. Kitchin, the gentleman from Illinois, Mr. Hinebaugh, the gentleman from Illinois, Mr. Graham, the gentleman from Iowa, Mr. Towner, the gentleman from Maryland, Mr. Lewis and myself. We met to confer, and concluded that we ought to make the language more explicit. In that conference, held in the Committee Room of the Committee on Rules, on the evening of May 21, 1914, we agreed that this language should be added at the end of the first paragraph of Section 7, to wit, after the word 'thereof':

> Nor shall such organizations, orders, or associations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-trust laws.

This language I have read is exactly the verbiage used by the gentleman from North Carolina (Mr. Webb) in the amendment offered by him and is the amendment agreed upon by Mr. Kitchin and our conferees in my office. The Committee on the Judiciary courteously accepted the language as prepared by the gentlemen in the conference, believing, I assume, that we were correct and that the original language used by them was not quite explicit. So we came to a satisfactory agreement with the House Judiciary Committee about this addition to the first part of Section 7, and as far as I am concerned, we are standing squarely with the Committee for that paragraph with our added language.

We called into the conference with us the heads of the American Federation of Labor, and submitted this amendment to them, and said to them that we believed its adoption as an addition to Section 7 would clearly exempt labor organizations and farmers' organizations from the provisions of the Anti-trust laws.

They agreed with us; they called their counsel into conference with them and with us and we all concurred that this amendment added to the paragraph of Section 7 would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman Anti-trust Law."

Cong. Rec., Vol. 51, Pt. 10, p. 9547, 63rd Cong., 2nd Sess.:

> "Mr. Towner. Mr. Chairman, I was not satisfied with the original language used in the paragraph, neither am I satisfied with the amendment proposed. Nevertheless, I will support the amendment. I will do this because it is the best that can be obtained, and I believe it will assist, at least, in some degree, to make clear the object and purpose of the provision.
>
> That object and purpose is, Mr. Chairman, to definitely state that the provisions of the Anti-trust laws shall not be so interpreted as to forbid the existence or operation of labor or farmers' organizations instituted for mutual help. With that object and purpose, I am in entire sympathy.
>
> I presume there has been no proposition discussed in recent years which has absolutely no valid objection to it that has been more misrepresented and abused. It has been termed a proposal to exempt certain classes from the operation of the law, while others are included; to punish one and release another for the same act; to say that all are not equal before the law. It is none of these things.
>
> *Any association of the classes mentioned, or any member who violates the anti-trust laws will be liable to their penalties the same as any other association or person. It is merely provided that the organization or legitimate operation of such association shall not be held to be within the prohibitions of the statute."*

The matter had now reached the point where the *House itself* had to settle it, and it proceeded to do so, just as Congress has always done, so far,

when it has been proposed to legalize violations of the anti-trust act by labor unions and farmers' organizations or their members; it flatly and emphatically voted down every amendment which was offered, and there were two of them, to make the Sherman Anti-Trust Act *not applicable* to labor unions. (Cong. Rec., Vol. 51, Pt. 10, p. 9569.) Mr. Thomas, of Kentucky, and Mr. MacDonald, of Michigan, were determined to force that issue and offered these amendments.

Speaking to the Webb amendment in connection with his own amendment, Mr. Thomas said (Cong. Rec., Vol. 51, Pt. 10, p. 9544, 63rd Cong., 2nd Sess.):

> "Mr. Thomas. Mr. Chairman, to say the least of this amendment, it is as ambiguous as the prophesy of a Roman oracle. As a matter of fact it means nothing. It is a mere declaration of that which is now the law. To make the statement that this law shall not be construed so as to hold certain organizations to be illegal is simply to state that those organizations per se shall not be declared illegal by this law. You might insert a paragraph declaring that under this law the Baptist Church or the Masonic order should not be construed to be an illegal combination in restraint of trade. They are not illegal, even, in the absence of that declaration. Agricultural organizations and labor organizations under this law are not illegal combinations, even without that declaration; and notwithstanding that declaration the very moment that an agricultural association or a laborers' organization violates any provision of this law it is applicable to such association, and they can and will be punished under the law. Any

man knows that. For instance, should these associations have in their by-laws or charters articles which allowed them to form conspiracies, to form monopolies in restraint of trade, does any man contend that the very moment they attempted to carry out such declaration of the organization they would not fall under this law? To be sure they would. If you are going to exempt these organizations, exempt them. If you are not going to exempt them, say so. The amendment which I shall offer after this amendment has been voted on simply declares that the provisions of the anti-trust laws shall not apply to any of these organizations. There you have a clear-cut exemption.

* * * * * *

As I had started to state, I believe when we go a-catting we ought to go a-catting; and I believe if we are going to take these organizations out from under this law we ought to do it in such a way that there can be no mistake about it and no reason for any court decisions upon the question hereafter. (Applause.) My amendment simply says that these anti-trust laws shall not apply to these organizations. If any man thinks he can make an amendment plainer than that, I would like to hear from that gentleman, even the gentleman from Texas (Mr. Henry).

* * * * * *

So I say, gentlemen, that if you are going to take them out of the provisions of these laws, take them out. If you are going to keep them in, why, keep them in and do not go to beating the devil around the bush about it. Come out plainly and let us keep them in or take them out, one of the two. The gentleman from Texas (Mr. Henry) tells us that when the Sherman law

was passed it was intended to exempt farmers' and laborers' organizations."

Mr. MacDonald, of Michigan, speaking to the Webb amendment in connection with his own, said (Cong. Rec., Vol. 51, Pt. 10, p. 9544, 63rd Cong., 2nd Sess.):

> "Mr. MacDonald. Mr. Chairman, I am very much in favor of the principle of exempting these organizations from the operation of the anti-trust laws. I expect to vote for the Webb amendment, if for no other reason, for the moral effect that the adoption of that amendment will have; but I am not given to self-deception, and in voting for that amendment I am not deceiving myself as to the effect of that amendment. That amendment may have some beneficial effect for the organizations mentioned therein but it will not exempt those organizations from the operation of the anti-trust laws. Now, the Supreme Court in the case of *Loewe* v. *Lawlor*, commonly known as the *Danbury Hat* case, puts this matter up to Congress in no uncertain terms. They say, on page 239 of Vol. 208 in the United States Reports,
>
> > 'After the Sherman law was enacted, bills were introduced in the Fifty second Congress——'
>
> and then they enumerate all the bills that have been introduced to amend the Sherman Antitrust laws, making it inapplicable to labor and these other organizations. And then they say:
>
> > 'Congress therefore has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more sig-

nificant, as it followed the recognition by the Court that the Sherman Anti-trust law applied to labor organizations.'

Now, the amendment that has been offered by the gentleman from North Carolina makes by implication these organizations subject to the terms of the law. It defines certain acts which are said in general terms to be permissible; and therefore by implication it leaves forbidden other acts which are not permissible, and makes by implication these organizations subject expressly to the terms of the Sherman law if they should violate any of the provisions of the law. Another point is this: The amendment provides that they shall be liable only within certain limits and those limits are confined to this—where they exercise their powers only for mutual help and not for profit. They are limited absolutely to that field in their operations, and who, forsooth, will decide whether their operations fall within the restrictions of mutual help and not for profit? Why, the courts, of course; and you will have the same old battle for definite construction over and over again. Therefore you have for certain purposes and as to certain acts brought these organizations where the courts may hold them expressly within the operation of the Sherman law.

Now, every gentleman who gives this matter any consideration instinctively realizes that this is true. The gentleman from Texas (Mr. Henry) realizes it as well as anybody else, because in his speech this morning he said, 'Gentlemen, we are going to make this law not to apply to these organizations.' He said, in his speech, 'Not apply'; why does he not say so in the amendment? There is no way of making it any

plainer or simpler or doing what you want to do than to use the language that the gentleman used in his speech, but which is not used in the amendment.

Mr. Murdock. Will the gentleman yield?

Mr. MacDonald. Certainly.

Mr. Murdock. And are not the words 'Shall not apply' the words used in the Terry amendment, in the Hamill amendment, and in the Hughes amendment?

Mr. MacDonald. Yes; every amendment proposed to this law has used the words, and that was in the amendment that the Supreme Court in the *Danbury Hat* case said if Congress had done those things there would be no question about the operation of the law."

In order to explain more fully the true meaning of Sections 6 and 20 of the Clayton Act, we insert here a further quotation from the remarks of Mr. Volstead, which contained an analysis of Sections 6 and 20, in order to show their connection with the judicial history of the subjects which they cover (Cong. Rec., Vol. 51, Pt. 17, appendix, pp. 1156, 1157 and 1158):

"First, it does not change in any respect the Sherman Anti-trust Act as it has been construed by the Supreme Court relative to these matters. Both the Senate and House Judiciary Committees, which reported the bill, so stated, and its provisions bear them out. The Senate committee in its report said:

'It is well, at the outset, to state the theory of the bill, both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the House measure is unchanged. It

> is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill.'

The Senate Committee also quoted from the report of the House committee to the same effect, as follows:

> 'The bill does not interfere with the Sherman Antitrust Act at all; it leaves the law of conspiracy untouched, and it is not open to effective criticism on any constitutional ground.'

Moreover the bill in section 4 re-enacts, word for word, section 7 of the Sherman Antitrust Act, under which the *Locaw* case was brought to and decided by the Supreme Court, without excepting that or any other case from its provisions, which action, upon established principles of construction, is an adoption by Congress of the doctrines of that case. In addition section 16 gives every person, without exception, the right to injunctive relief against threatened loss from conduct of any one in violation of that act, without excepting any case whatever. Read in the light of the foregoing, section 6 of the bill is nothing more than a legislative declaration of the law as it had been laid down by the Supreme Court in the case of *Adair* v. *United States* (208 U. S., 178), which was under consideration by the Court along with the *Locaw* case and was decided just one week before it, to the effect that Congress under its power to regulate commerce had not prohibited and could not prohibit the existence of labor organizations as such. The court there said:

'Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, in itself and in the eyes of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of their members as wage earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the services of an interstate carrier will, it must be assumed, faithfully perform his duties, whether he be a member or not of a labor organization. It cannot be assumed that his fitness is assured or his diligence increased by such membership or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man and not as a member of a labor organization who labors in the service of an interstate carrier.'

The right of labor unions as such to exist and the limitations on their lawful activities, are well defined in the case of *Gompers v. Buck's Stove & Range Co.* (221 U. S., 439), and Section 6 of the Clayton Bill is

but a declaration by Congress to the same effect, and is almost a paraphrase of it. The Court in that case said:

> 'Society itself is an organization and does not object to organizations for social, religious, business, and all legal purposes. The law therefore recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, the influence and power that comes from such association. By virtue of this right, powerful labor organizations have been organized. But the very fact that it is lawful to form these bodies with multitudes of members means that they have thereby acquired a vast power in the presence of which the individual may be helpless. This power when unlawfully used against one cannot be met except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.
>
> In the case of an unlawful conspiracy the agreement to act in concert when the signal is published gives the words "unfair" "we don't patronize," or similar expressions a force not inhering in themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what has been called "verbal acts" and as much subject to injunction as the use of any other force whereby property is unlawfully damaged.

> When the facts in such a case warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction.'

I insert here for comparison with the foregoing declarations of the law by the Supreme Court the words of Section 6 of the Clayton Bill, that it may be seen that they work no change in the existing law.

> 'The labor of a human being is not a commodity or an article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.'

In this connection it is proper to refer to the legislative history of this section for its better understanding. For 24 years the labor unions had sought specific exemption from the provisions of the Sherman Anti-trust Act by an amendment of it, stating it should 'not apply to' them but had never succeeded. When the Clayton Bill was before the House, several attempts were made to amend this section by inserting in lieu of the words 'shall be construed to forbid the existence, etc., of labor unions, etc.,' the words 'shall apply to,' but they were all defeated. This was but a repetition of what

was thus described by the Supreme Court in the *Loewe* case:

> 'The records of Congress show that several efforts were made to exempt by legislation organizations of farmers and laborers from the operation of the act, but all these efforts failed, so that the act remained as we have it before us.'

This section further declares nothing in the antitrust laws shall be construed to forbid or restrain the individual members of labor unions from lawfully carrying out the legitimate objects thereof. The legitimate objects of labor unions, of course, are the same as those of other people, the advancement of their own interest by lawful means. This section, therefore, does not affect in the least the restraints of the Sherman Antitrust Act upon the members of such unions from carrying out unlawfully either the legitimate or illegitimate objects thereof.

When does a labor union become an unlawful combination under the Sherman Act, and what are the means which it and its members are prohibited thereby from using? The answer is to be found in *Eastern States R. L. D. Association* v. *U. S.* (234 U. S., 600).

* * * * * *

This section does not affect in any respect the liability of the members of such unions for the unlawful acts of their officers and agents when within the scope of their authority as the same has been established in the *Loewe* case. Nor does it change in any way the rules of evidence by which the unlawful nature of such combinations is established. The same remain as laid down

as follows by the Supreme Court in the *Retail Lumber Dealers'* case above cited.

* * * * * *

Nor does this section sanction the existence of, or remove from the condemnation of the civil and criminal provisions of the Sherman Act or justify or excuse a conscientious Department of Justice in neglecting to proceed against, such a combination as the American Federation of Labor, whose constitution provides for the declaration of boycotts and establishes a vast machine for their prosecution in interstate commerce, and directs its executive council to secure the unification of all labor organizations so far as to assist each other in making the same effective, and whose principles and methods are thus accurately described in the following report unanimously adopted by its convention of 1905:

> "We must recognize the fact that a boycott means war, and to successfully carry on a war we must adopt the tactics that history has shown are most successful in war. The greatest master of war has said that war was the trade of a barbarian, and the secret of success was to concentrate all your forces upon one point of the enemy, the weakest if possible. In view of these facts, the committee recommends that the state federations and central bodies lay aside minor grievances and concentrate their efforts and energies upon the least number of "unfair" parties or places in their jurisdiction. One would be preferable. If every available means at the command of the state federations and central bodies were concentrated upon one such, and kept up until successful, the next on the list would be more

> readily brought to terms, and within a reasonable time none opposed to "fair" wages, conditions or hours but would be brought to see the error of their ways and submit to the inevitable.'

> The Sherman Antitrust Act, having been enacted under the constitutional power of Congress to regulate commerce among the states, is of course the supreme law of the land in all cases within its purview in every state, territory, and district, and judges of every court, federal and state, are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Since there is nothing in the Clayton Bill which limits in any way the restraints of that act upon the unlawful acts of labor unions or their members, and since it goes still further and specifically grants to any person threatened with irreparable injury from acts forbidden by that act injunctive relief, the protection of the individual, whether employer or employee, instead of being impaired is greatly increased thereby."

Judge Hough qualified, somewhat, his statement that the announced intent of Sections 20 and 6 was to legalize the "secondary boycott" by adding the words "at least in so far as it rests on or consists of *refusing to work for anyone who deals with the principal offender*. The contrary intent was announced again and again in debates. The distinction between *a simple strike* and a *boycott by means of a strike* was clearly pointed out in the debates, and it was repeatedly asserted and never denied that the Clayton Act was not intended to, and did not legalize *a boycott by means of a strike*. And particularly on the afternoon of August 29th, 1914,

the particular method of boycotting by strikes employed in this case and in the case of *Paine Lumber Co.* v. *Neal*, 244 U. S., p. 459, was specifically brought to the attention of the Senate, with the explicit statement that the Clayton Act did not, and probably could not constitutionally, legalize it, and this assertion was never disputed or questioned. We quote from the remarks of Senator Thomas, of Colorado, one of the ablest lawyers of the Senate, on that subject (Cong. Rec., Vol. 51, Pt. 14, pp. 14021, 14022, 14023):

> "Mr. Thomas. Mr. President, I have given much thought to section 7, and from time to time have considered its provisions since it was reported from the House committee and thus became a part of the bill which has attracted universal public attention. I think that that section as it has been amended here *corresponds to the Democratic pledge upon the subject*, and I am still old-fashioned enough to want to adhere to the platform of my party wherever it is possible. My faith in it receives an occasional severe jolt, but still I think it is making fairly good progress over a rough road.
>
> * * * * * *
>
> Mr. President, I was a member of the Democratic national convention of 1908, which met in my city. My delegation did me the honor to place me upon the committee on resolutions, which reported that platform to the convention, where it was adopted. Among other things, we said:
>
> > 'The expanding organization of industry makes it essential that there should be no abridgment of the right of wage earners and producers to organize for the protection of wages and the improvement

of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade.'

The convention of 1912 adopted that plank of the platform of 1908 in haec verba, so that our attitude upon the subject in 1908 was our attitude in 1912 and should be our attitude here. That declaration was inspired by the fact that the courts ever since the case of the *United States* v. *Workingmen's Amalgamated Council* (54 Fed. 994), which arose in the State of Louisiana, have been inclined to hold and have held in several instances that labor organizations were *per se* organizations in restraint of trade and therefore obnoxious to the provisions and prohibitions of the Sherman Act. The object of the Democratic Party in this platform declaration was to provide against that contention by legislation necessary for the purpose, so that as far as the labor organization was concerned it should start out upon the same plane and occupy the same position held and occupied by a corporation. And that object is subserved by this section if my construction of it is the correct one.

* * * * * *

For one, Mr. President, I do not want to be a party to the enactment of a law the operation of which is going to prove disappointing to those who may build so much upon it, and inasmuch as I think this statute merely declares that organizations per se shall not be obnoxious to the antitrust law, I deem it important both to my party and myself that I give my views as to the meaning and effect of this section. It declares:

> 'That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purpose of mutual help. * * *'

And so forth. But for the decisions to which I have referred that declaration would not be necessary. It is not necessary that we should here say that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of corporations, because corporations as such are not forbidden to exist by law. Corporations are as free to organize and carry on their legitimate business since, as they were before, the enactment of the anti-trust law, and when in this section we declare that nothing in the anti-trust law shall forbid the existence and operation of agricultural and labor unions, we simply say that these organizations and the corporations shall stand on the same equality, shall occupy the same level, and may exist as such without running counter to the provisions of the anti-trust law. Let us proceed:

> 'instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.'

The effect of this section is to neutralize and to render inoperative those decisions of the class to which I have referred, which declare or tend to declare that these organizations

are *in themselves* organizations in restraint of trade, and therefore subject to dissolution.

The fact of existence, their status, in other words, is fixed by this section, and in so far as their objects are legitimate and in the pursuit of them legitimate measures are used there can be no conflict with the antitrust laws. The same thing may be said of corporations great and small. But beyond that, Mr. President, this section does not go. The thing itself is legalized. Whether it comes under the provisions of the antitrust laws depends upon its future conduct, which may or may not be offensive to those statutes.

The union can do nothing, in other words, that the corporation cannot do under this statute if it proposes to steer clear of the anti-trust laws. The corporation can do anything that the labor union can do and keep out of the clutches of the antitrust law. Its purpose, in other words, Mr. President, is to create an *equality of status*, and beyond that the general laws of the country are operative.

I think, Mr. President, that *so far as strikes are concerned* they cannot be punished or prevented by anything contained in the antitrust law if this section is adopted. I say that first, because I am aware of no court in the country except in cases involving the operation of some of our public transportation companies—and those decisions are, to some extent, obsolete—which declares that ceasing to work either individually or collectively is an offense against the laws of the country. And I question whether a lock-out, *unless designed to restrain commerce*, is not lawful also.

It is a fundamental principle that every man in this country is entitled to work if he wants to. It is an equally fundamental

principle that every man is entitled to abstain from working if he wants to, and the denial of either of these rights is necessarily a denial of the other, and will logically lead to the abolition of both. They must coexist or they will mutually disappear.

So that the *act of striking*—which is negative, in that its primary operation is such whether universal, whether communal, or individual—is perfectly proper under this law as it should be a recognized legal right of the citizen everywhere without it.

For example, if the brotherhood of railway trainmen, after the enactment of this statute, should for reasons satisfactory to themselves, determine to quit working, they would have a perfect right to do so. There is nothing in the statutes which we call the antitrust laws, or in this statute, that would justify any interference with the exercise of that right. It may be that this section, Mr. President, is an improvement upon the present statutes in that it emphasizes and legalizes, if further emphasis is necessary, the right of the individual and the right of the organization to quit work and to abstain from working as long as desired, and not be subject to any of the provisions of the antitrust law.

Therefore with reference to this branch of the subject, I may summarize the situation by the statement that section 7 makes, so far as the antitrust laws are concerned, all labor and agricultural associations lawful and endows them with power, if they did not have it before, of carrying out in a lawful manner the legitimate purposes and objects of their organization, but they may nevertheless so act as to violate the law just as corporations or individuals may violate it by conduct which brings them within its prohibitions. No combination really be-

comes a combination in restraint of trade until it does something, until it takes some active steps, until its plans are effected or sought to be effected by overt acts. A man may contemplate a crime, and the law is powerless to lay its hands upon him until by some act he does or attempts the thing forbidden.

So it is the act or the attempted act, in its last analysis, which makes a corporation or any other association of individuals subject to the provisions and the inhibitions of the antitrust law, and it would be a mistake if this bill were enacted into a statute under the mistaken impression that it does something more; otherwise a large class of our fellow-citizens might well say they asked us for bread and received a stone.

A combination of men, like any other combination, can become, through their actions, a conspiracy in restraint of trade. We may imagine a half dozen merchants doing business individually in the City of New York combining with a half dozen merchants doing business individually in the City of San Francisco to carry out some line of policy as thoroughly prohibited by the antitrust acts as we can imagine similar conduct between as many corporations similarly located. We may also imagine a combination in restraint of trade between organizations of men who are unincorporated in the City of Philadelphia and organizations of men who are unincorporated in the City of New Orleans quite as easily as we can imagine it between corporations existing in those two places. The difference is not in organization, not in the components which make up those committing the offense, but in the offense itself. It seems to me, therefore, that he who defined this proposed statute as one giving full immunity to organizations

whereby they would be entirely exempted from the operative provisions of existing statutes either has not given this section the careful consideration it deserves or else is able to give it a construction to which I cannot assent.

Mr. President, I have said that *under this proposed statute* there can be, in my judgment, no question about the right of organizations *to strike*, to abstain from working if they see fit to do so, but there may be a *vast difference between a strike and what is called a boycott*. One consists in the exercise of undoubted constitutional rights; the other consists in the exercise of a power which may or may not conflict with the guaranteed rights of other individuals, which may or may not come within the prohibitions of existing statutes. If it does not, there is no penalty; if it does, then the penalty should be as inevitable, and I think is as inevitable, in the one case as in the other.

Mr. President, a boycott, as I have said, may or may not be an act in restraint of trade, but it is difficult to conceive of an effectual boycott that is not in restraint of trade to a greater or less degree. It is true that a boycott may be practiced upon the individual without reference to the thing or commodity involved. It is equally true that you can seldom separate the one from the other. As a consequence, unless section 18—about which I will perhaps have something to say when we reach it—makes a change which I am unable at present to conceive, this bill, if enacted, will not relieve any organization from the consequences of the antitrust acts *if, in carrying out what is known generally as the boycott*, there is involved a restraint of trade under the meaning of the antitrust laws.

Mr. President, let me instance one or two forms which the boycott has taken to which public attention has been directed and which to my mind, irrespective of this proposed statute, *will bring those who repeat the same practice directly within the antitrust acts.* I read from the World's Work of July of this year at page 257, the following:

'The Unions and The Sherman Act.

Some time ago a department store in one of our large cities bought some goods from a manufacturer who was at odds with the local union. A walking delegate went to the manager of the store and told him not to buy from that manufacturer. The store manager replied that he was not concerned in the union's fight and that, as he could serve his public best by buying from the non-union manufacturer, he would continue to do so.

The next day a woman came into the store and ordered a large ice chest to be delivered C. O. D. on the top floor of an apartment that had no elevator, four or five miles from the store. When the ice box was finally in place, the woman told the delivery men from the store that she did not want it because she had learned that the store dealt with manufacturers who were "unfair" to labor. The next day a similar thing happened, and again the day after. Such annoyance finally became so common that the manager of the store notified the offending manufacturer that he would no longer deal with him. Then all went well again, except that the public got a poorer article made in a union shop for the price it used to pay for the better article.

In a certain small town the school authorities had decided upon a set of read-

ers for the school, their judgment being based entirely upon the educational merits of the books and upon the price. When the purchase was about to be made, some of the members of the Town Council who were members of the unions were told that these books were not made entirely in a union shop. The members of the Council (the body that pays the school bills) suggested that another set of books, the product of entirely union shops, be substituted. The school authorities made the change and all went well—except that the children of the town were taught from inferior books.

A company that employed non-union men in the manufacture of building materials sold a large part of its product in a large city near its plant. The unions of the building trades refused to allow their members to work on buildings where the materials came from this company. The unions were very strong and the company was driven out of that field, in other words, competition was reduced by the elimination of one competitor.'

Mr. President, these acts are essentially acts in restraint of trade. They necessarily affect commodities which but for them would take their chance in competitive markets and succeed or fall upon their own merits. If they are entirely shut out, as was the case here, there necessarily is an injury to trade and that injury comes from combined action. You may call it what you will, but the effect upon trade is the same. *There is nothing in this bill, and there is nothing that we could constitutionally put into this bill, that would so far legalize such acts as to exempt those committing them from responsibility under the general statutes of the nation.*

In this connection I want to call attention, Mr. President, to an article written by one Walter Gordon Merritt, a gentleman whom I do not know, with whose views I am not in full accord, but who makes some observations upon the subject which I am now discussing that seem to me to be entirely pertinent. He says:

> 'Labor unions occupy a new relation to the law of to-day, not on account of the change in the law, but on account of the change in their activities and of their assertion of an interest in the sale and distribution of commodities which are the subject of commerce. The adoption of the union label and the statutory regulations in connection therewith, which create a new right unknown to the common law, show the tendency of organized labor to follow the products of their labor into commerce by booming the sale of union-made goods, and suppressing the sale of non-union goods.'

We may concede, Mr. President, that labor is not a commodity, and, not being a commodity, should not be made subject to the provisions of the antitrust law; but when labor unites its element, whatever it may be called, commodity or otherwise, with the things which it produces and goes into the market for the purpose of promoting or preventing its sale, then we must consider it in connection with the commodities to which such action relates; and in as much as it asserts its interest in the thing which it creates and uses its tremendous power in influencing markets for and against it, necessarily it occupies a different attitude from that which it occupies in the matter of working or of refusing to work.

This illustrates the fundamental difference *between the strike and the boycott;* the one concerning labor, the other concerning labor and its products; and in so far as its products are identified with the act, just insofar will there be collision with the provisions of the antitrust act.

We passed a bill here the other day in which we declared that unfair competition is made unlawful. We did not say that unfair competition of corporations shall be made unlawful; that unfair competition of attorneys at law shall be made unlawful; that unfair competition by any particular class of artificial or natural persons shall be made unlawful; but that unfair competition, wherever and by whomsoever practiced is made unlawful; and when the element of the boycott enters between competitors by taking sides with one and against the other, unfair competition is just as certain to result as that the law of gravitation operates at all times.

'All boycotts are direct attempts to control the relation between producer and consumer, while most strikes are the direct attempts to control the relation between employer and employee. The ordinary strike attacks the working organization, or the productive machinery; the boycott attacks trade and goodwill, or the distributing machinery. The first affects manufacturing, with which the antitrust act has no concern; the second affects the sale and distribution of commodities through commerce, to which the law does apply. The well organized effort of the unions to drive open shop articles from interstate commerce clearly offends the Sherman antitrust law and the same is true of any effort to destroy or suppress

the competition of any non-union manufacturer.'

This statement, Mr. President, will remain unchallenged until the Sherman law is modified or repealed.

Let no man, either in this body or out of it, lay the 'flattering unction' to his soul that the enactment of this proposed statute is going *to exempt organizations from the consequences of such a boycott.* There is nothing in this bill, and I repeat that I do not think that constitutionally we could put anything into this bill, that would give it such effect, and he is deceived and will be sadly disappointed who places any other construction upon this proposed law. This author continues:

'When workingmen pass from the strike to the boycott, they play the role of producers of merchandise, interested, like their employers, in the sale and distribution of products, which are the joint fruits of capital and labor. The employer seeks to advance the sale of his products in preference to those of his competitors and the union seeks to advance the sale of products made by union men in preference to those made by non-union men. Like the employer, the union at times resorts to the illegal practice of suppressing competitive sales. In such cases both employ the same means for the same end, for both block the channels of interstate commerce in order to fill their own pocketbooks.'

I do not see, Mr. President, how any man for a moment can question the mathematical accuracy of that statement. It is made dispassionately, and, of course, all discussions of so very important a subject as this

should be made without any passion or prejudice, for, Mr. President, legislation conceived and enacted in either generally acts like a boomerang—it recoils upon those for whose benefit it is proposed to have been enacted.

> 'The derailment of a train for the purpose of preventing the transportation of competitive products would be the clearest violation of the antitrust law. In such a case no one would doubt that an employee would be equally guilty with the employer in committing such a crime, yet the blocking of the channels of interstate distribution by intangible methods is open to the same argument.'

Mr. President, if it be true that under the provisions of this bill labor organizations may indulge with impunity in the boycott, then it is equally true that manufacturers may combine with labor organizations in boycotting their competitor's goods, and because of such combination they will also become exempt from its operation, for it is an elementary legal proposition permitting of no exception that if the principal is not guilty the accessory cannot be guilty. The result would be that we would have a statute prohibiting corporations from any act in restraint of trade unless those actions were in combination with employees, in which event they would be absolutely exempt from its provisions and the Sherman act would cease to be an effective force in interstate commerce. The mere statement of such a proposition is its own refutation.

We all know that in many instances such combinations are made; that unscrupulous concerns and manufacturers deliberately unite with labor organizations for the purpose of preventing that competition which

if it existed would be helpful for the public, but at the same time result in reduced profit to those interested. I can give one or two instances:

> 'The Manufacturing Woodworkers Association of New York, composed of union manufacturers of wood trim, agreed to employ only union carpenters on condition that the union will protect them from all openshop competition by calling strikes on all buildings where openshop products are used. Through this combination, no non-union woodwork—which is twenty-five to fifty per cent. cheaper than union woodwork—can be used for building purposes in certain parts of the country, because the builder is deterred from purchasing such material for fear of disastrous strikes. Monopoly and inflated prices are thus assured, while employer and employee divide the profits.'

I am told, Mr. President, that one result of this agreement between the manufacturing woodworkers in the City of New York and the union organizations of that city is that it has completely excluded all non-union wood-trim products from that market, in consequence of which the others have an absolute monopoly and fix their own prices.

I am not arguing for its justice or its injustice; I am simply calling attention to the far-reaching fact that when you concede the exemption of any association from the operation of the prohibitions of the anti-trust act, you open a door which will permit of its absolute violation with impunity all along the line. Having conceded such an exemption, I cannot conceive of a product of commerce, I cannot conceive of a business in which men engage which by combi-

nations between corporations and unorganized associations cannot snap its fingers in the face of the antitrust act and march forward to monopoly without regard to the power and dignity of the government.

Mr. President, it has been said—I do not know whether it is true or not—that the strikes in West Virginia were largely financed by coal operators in Ohio, Indiana, Illinois and western Pennsylvania, in order to overcome the natural advantage which the West Virginia mine owner had because of the quality of his coal, the manner in which nature has placed it in the earth, and the advantage of other conditions which are commercial in their character. Whether it be true or not, the possibility of the accomplishment of such a thing is certainly obvious to any one, and therefore I repeat that if under the provisions of this bill a boycott aimed at the distribution of products is legalized, then the producers of certain lines of those products, by combining with those carrying on the boycott, can effectuate their own monopoly in defiance of the prohibitions of the existing law. *I do not think, Mr. President, that there is any part of the country or any citizenship in any part of the country in or outside of labor organizations that would seek or attempt to justify or expect the enactment of legislation having that effect.*

There is another thing, Mr. President, with reference to this bill to which I want to call attention. I must repeat that my main purpose is to inform those interested in the measure that this bill is not the all-embracing panacea which some seem to think, to the end that there may be no flare-back as against this Congress after its provisions are tested by the courts. *This bill does not, because it cannot, interfere with*

the operations of any state law bearing upon the subject of labor organizations, of corporate monopoly, or any other commercial legislation. It may be, Mr. President, that our steady and constant advance towards centralization, our usurpation, if I may use the word, first of one and then of another hitherto recognized state right, will ultimately bring all these things under the shadow of the National Capitol. It may be that even I shall live to see the state relegated to the position which counties in the states now occupy and the national government extend its arms, like those of Briareus, until they shall take in and embrace every subject of local concern.

Of course this bill does not pretend to interfere with the operation of state laws; but, Mr. President, we should make the statement here, so that we cannot be misunderstood hereafter, that every repressive statute now upon the statute books of every state will be just as effective, just as operative, and just as vigorous as it is at present. *The legislation which we are enacting, within the provisions and pledges of the Democratic platform, means what the language employed conveys to the mind, and will be so construed.*

I have heard it said, though not in any authoritative way, Mr. President, that this bill is desirable because of the complaints which have been made concerning the unjust nature of State legislation. I have heard it constantly asserted that as soon as this bill is enacted into law every statute in conflict with it, wherever existing, disappears to the extent of such conflict. That is an impression which ought not to be entertained anywhere and which I think justifies calling attention to the fact, however obvious its unfounded character may be to members of this body.

> The amendments proposed by the Senate Committee, Mr. President, are, in my mind, admirable, in view of the purposes sought to be subserved; and, as it stands, the bill ought to become a part of the statutes, since it meets the legitimate objecions which have been made to the provisions of the Sherman Law based and founded, as those objections are, upon criticism and comments made by the framers of that measure at and before the time of its enactment."

The legislative history, and the contemporary history, to a large extent, of Sections 6 and 20 of the Clayton Act, are contained in the seventeen parts of Volume 51, of the Congressional Record, comprising more than 20,000 pages, which preserve the collective wisdom of the 63rd Congress at its 2nd Session, and we confidently assert that there is nothing therein which justifies the opinion of his Honor Judge Hough, "that the designed, announced and widely known purpose of Section 20 (perhaps in connection with Section 6) was to legalize the secondary boycott, at least in so far as it rests on and consists of refusing to work for any one who deals with the principal offender."

During the 62nd Congress, at its second session, when the present Section 20 of the Clayton Act (then Sec. 266c of the Clayton Bill, then pending before the House, which is set out in full in Sen. Rep. No. 698, 63rd Cong., 2nd Sess., at p. 35), was under discussion in the House, Hon. John W. Davis, then a congressman from West Virginia, a member of the House Judiciary Committee, which reported the bill, and perhaps its author, said of its purpose and effect (Cong. Rec., Vol. 48, Pt. 7, p. 6440, 62nd Cong., 2nd Sess.):

"Mr. Davis: Gentlemen say that the effect of this bill is to legalize the so-called 'Secondary boycott.' *I deny it.* In the first place, as the gentleman from Pennsylvania (Mr. Wilson) has said the word 'legalize' is misused. The bill does not pretend to be a code governing the conduct of trades disputes. All that is attempted here is to say that certain acts are not amenable to the process of injunction, whatever other rights or remedies may grow out of them; but *within the acts enumerated by this bill, the secondary boycott is certainly not included.*

* * * * * *

What is the secondary boycott? It can be summed up in a sentence as coercion in some form directed against a person who is not a party to the trades dispute, in order to force him to join in injuring one of the parties to the dispute. It is a clear invasion of the rights of neutrals. The law recognizes the fact that a man may employ whomever he chooses and may be employed as long as he will. When the relation of employer and employee ends, either may withdraw patronage or favor from the other; either may announce to his friends that he has so withdrawn; but neither can say to friend or foe that at the risk of personal injury they must, though unwilling, join in the conflict.

The language of this bill is:

> 'From ceasing to patronize or to employ any party to such disputes, or from recommending, advising, or persuading others by peaceful means so to do.'

Does anything less than this protect the fundamental and constitutional rights of the

parties concerned? I repeat that the essence of the secondary boycott is coercion directed towards a person not a party to the dispute. This bill does not *countenance coercion towards any one*, and least of all towards third parties. I ask leave for another quotation from Martin's Modern Law of Labor Unions, pages 107 to 109, to which I have referred in support of this position.

* * * * * *

> 'The vital distinction between combinations of this character and boycotts is that here no coercion is present, while, as heretofore shown, coercion is a necessary element of a boycott.'

It will be seen that all through the section there runs the requirement of peacefulness. Force, violence, intimidation, fraud, coercion—none of these will any man seek to justify, *whether they be used in a trades dispute or elsewhere*.

* * * * * *

It has been suggested by those opposed to Sec. 266c of this bill that it is class legislation. Such an assertion mistakes the meaning of the term. It is not legislation which confers upon the employer or the employee or upon those seeking employment any immunity or privilege *which others do not enjoy*, nor does it take away from either employer or employee any right *which others might exercise*. It does not even undertake to codify the rights of employer and employee in trades disputes, a thing which has been done elsewhere and may, soon or late, have to be done here.

It does undertake to regulate to a limited extent *the procedure in cases arising from such disputes*, but in doing so it simply an-

nounces rules *common to other cases in equity*, and it does declare that certain acts *lying within the rights of the parties* shall not be infringed upon by any injunction."

During the same discussion of this section, Congressman Swagar Sherley, of Kentucky, said of its purpose and effect (Cong. Rec., Vol. 48, Pt. 12, appendix, p. 935):

"Mr. Sherley. I come now to Section 266c, which I do desire to discuss, as some of its provisions are evidently worrying gentlemen who are in doubt as to how far they go relative to boycotts. In my judgment, the proposed law does not prevent the issuing of injunctions in matters of *secondary boycott*. We use the word 'boycott' in a rather loose way. Sometimes we mean by it what is known as the primary boycott, sometimes and usually we mean by it what is known as a *secondary boycott*. There is nothing here that prevents a Court of equity from dealing with the *boycott in that secondary aspect*. As to a boycott in its primary effect, I do not believe the power of a Court of equity ought to go to the length of issuing a writ of injunction.

The President of the United States when a Judge defined the secondary boycott, and defined it in substance as one in which the element of coercion as to a third party obtained. It is where there is an attempt upon the part of one party to a controversy to say to a third party, 'If you do not cease to patronize or aid the first party, we in turn will boycott you and punish you for your intercourse and trade with that party.'

This Act does not anywhere undertake to justify that proceeding or to say that the court shall not issue a writ of injunction. Judge Taft in *Toledo Company* v. *Pennsyl-*

vania Company, 54 Federal Reporter, used this exact language:

> 'As usually understood a boycott is a combination of many to cause a loss to one person by coercing others against their will to withdraw from him their beneficial business intercourse, through threats that unless those others do so the many will cause similar loss to them.'
>
> • • • • • •
>
> Then the Section goes on to say:
>
> 'And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment.'

Does anybody here believe a court of equity ought by a writ of injunction to be able to compel a man to continue in the relationship of servant and master? The very best decisions of the most learned courts in America have long ago declared that a Court of Equity would not issue an injunction to compel a man to maintain the relationship of employee to an employer—

> 'Or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do.'

That is not the secondary boycott. If you did not have the word 'peaceful' there, some such argument might be made; but can it be contended that any great harm is coming to the land by virtue of the right of one man to peacefully offer to another reasons and arguments why he should not continue the relation of employee to an employer? And all the suppositious cases of wrong made

legal by the section that so greatly alarm gentlemen are not exempted by the section: *because they are not peaceful. The word has a much wider meaning than the opposite of violent.*

* * * * * *

Mr. Martin, of South Dakota. Will the gentleman yield?

Mr. Sherley. For a brief question.

Mr. Martin, of South Dakota. I suppose if there is any provision in the bill that would permit a secondary boycott, it is what the gentleman has just read. I want to ask him, in case A seeks to dissuade B from patronizing C by stating to B that if he patronizes C he, A, will withhold his patronage from B, would that, in the gentleman's view, be a *peaceful persuasion?*

Mr. Sherley. It would not. *It would be a secondary boycott and is not embraced within the exemptions of this bill, in my judgment. (Applause.)*"

Judge Hough, in his opinion (Record, p. 219), concedes the disastrous effects to workmen and employers of the construction of Sections 20 and 6 of the Clayton Act which he adopts. He, nevertheless, holds that Congress deliberately intended to enact a law which would produce that result. He thinks the language of those sections ambiguous, susceptible of two meanings, one broad and destructive, the other narrow and harmless, and since he thinks that he must either hold that Congress designed to do an evil thing, or what he says is a practically futile thing, he chooses the first alternative. It does not seem to have occurred to him that Congress, recognizing the disastrous effect of the law, as construed by him which he has

so clearly pointed out, purposely restricted the provisions of Section 20 to the limited class of cases to which he says it would apply, under the construction of it which he rejects. Certain it is that Congress purposely and deliberately did so restrict it. The legislative history of the section and the debates upon it prove it.

POINT II.

The defendants are engaged in a combination and conspiracy to injure the plaintiff's good will, trade and business, and such a combination is unlawful at common law.

The dissenting opinion of Judge Rogers clearly sustains this point and cites abundant authority for his conclusion. However, the principal cases in support of our conclusion as to the common law are herewith enumerated:

Shine v. *Fox Bros. Mfg. Co.*, 156 Fed., 337.

Auburn Draying Co. v. *Wardell*, 227 N. Y., 1; 178 A. D., 270; 89 Misc., 501.

Irving v. *Joint District Council*, 180 Fed., 896.

Huttig Sash & Door Co. v. *Fuelle*, 143 Fed., 363.

Purvis v. *Local Union*, 214 Pa. St., 348.

Purington v. *Hinchliff*, 219 Ill., 139.

Lohse Patent Door Co. v. *Fuelle*, 114 S. W., 997 (Mo.).

Moores v. *Bricklayers*, 23 *Law Bull.*, 665 (Ohio).

Thomas v. *Cincinnati etc. Ry. Co.*, 62 Fed., 818.

Toledo A. A. & M. Ry. Co. v. *Penn*, 54 Fed., 730.

Thompson Mach. Co. v. *Brown*, 104 Atl., 129 (N. J.).

Employing Printers v. *Dr. Blosser*, 50 S. E., 353 (Ga.).

Purington v. *Hinchliff*, 219 Ill., 139.

Seubert v. *Reiff*, 98 Misc., 402; 164 Supp., 522.

Schlang v. *Ladies' Waist Workers*, 124 Supp., 289; 67 Misc., 221.

Burnham v. *Dowd*, 104 N. E., 841 (Mass.).

Attempts are being made to compel neutral parties—purchasers, truckmen and advertisers—to discontinue their dealings with the plaintiff by strikes and threats thereof, so that the presses can be neither advertised, purchased, carted, installed nor operated. This is the very essence of a secondary boycott.

> "The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes and there is no doubt that (to quote from the well known work of Chief Justice Erle on Trade Unions) *'at common law every person has individually and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction.'*"

Loewe v. *Lawlor*, 208 U. S., 274, 288.

The primary objection of the plaintiff to the combination set forth in this case is that its customers or possible customers are threatened with such consequences if they deal with the plaintiff, that they are deprived of their freedom of choice and do not dare to deal with the plaintiff. In this way the ordinary opportunities of trade, which should be open to the plaintiff, are closed.

> "It creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public."
>
> *Martell* v. *White*, 185 Mass., 255.

The cases cited fully sustain our views, and in citing them we limited ourselves to strikes against the use of articles. The other class of boycott cases which are based on the same fundamental principle is covered by the following citations:

Barr v. *Essex Trades Council*, 53 N. J. Eq., 101.

Beck v. *Teamsters' Protective Union*, 118 Mich., 497.

Gompers v. *Buck Stove & Range Co.*, 221 U. S., 418.

Callan v. *Wilson*, 127 U. S., 540; 32 L. Ed., 223.

Branson v. *Industrial Workers*, 95 Pac., 354 (Nev.).

Casey v. *Cincinnati Typo. Union*, 45 Fed., 135.

Crump v. *Commonwealth*, 84 Va., 941.

Ertz v. *Produce Exchange*, 79 Minn., 140.

Evenson v. *Spaulding*, 130 Fed., 517.

Gray v. *Building Trades Council*, 91 Minn., 171.

Beattie v. *Callanan*, 82 A. D., 7; 81 Supp., 415.

Matthews v. *Shankland*, 56 Supp., 123; 25 Misc., 604.

Hopkins v. *Oxley Stove Co.*, 83 Fed., 912.

Lowe v. *California State Federation*, 139 Fed., 71.

Lucke v. *Clothing Cutters*, 77 Md., 396.

My Maryland Lodge v. *Adt*, 100 Md., 283.

National Telephone Co. v. *Kent*, 156 Fed., 173.

Rocky Mt. Telephone Co. v. *Montana Fed.*, 156 Fed., 809.

Seattle Brewing Co. v. *Hansen*, 144 Fed., 1011.

State v. *Glidden*, 55 Conn., 47.

Baldwin v. *Escanaba*, 130 N. W., 214 (Mich.).

A. F. of L. v. *Buck Stove & Range Co.*, 33 App. (D. C.), 83; 32 L. R. A. (N. S.), 748.

Harvey v. *Chapman*, 115 N. E., 301 (Mass.).

Martin v. *McFall*, 63 N. J. Eq., 91.

Webb v. *Drake*, 26 So., 791 (La.).

Wilson v. *Hey*, 83 N. E., 928 (Ill.); 16 L. R. A. (N. S.), 85.

Jensen v. *Cooks & Waiters*, 39 Wash., 531.

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S., 229.

The strikes declared against the complainant's customers are unlawful because calculated and intended to injure the customers, and not for the pur-

pose of improving the conditions of employment of the strikers.

Pickett v. *Walsh*, 192 Mass., 572.
Burnham v. *Dowd*, 104 N. E., 841.

We do not question the workers' right to strike against machinery or materials which are inherently objectionable to them, but no such right exists where the purpose is to force that employer to cease patronizing some manufacturer a thousand miles away with whom the workers have no legitimate connection. A strike for such a purpose is one to injure and not to improve the conditions of employment.

In the case of *Pickett* v. *Walsh* (*supra*) the Court said:

> "In our opinion organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute. Or, to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

Judge Taft's decision in the case of *Thomas* v. *Cincinnati R. Co.*, 62 Fed., 818, and the case of *Moores* v. *The Bricklayers' Union*, 23 *Law Bull.*, 665 (Ohio), very clearly and forcibly expressed this doctrine.

Any strike is a combination calculated to injure another and is not justifiable or allowable except where the strikers *themselves* are seeking an improvement in their conditions of employment. The absence of such a justification in calling strikes against the complainant's customers and the fact

that they are but a scheme of coercion to disrupt business relations between the complainant and its customers, condemns them as illegal.

Where, as in this case, the object of the combination is the closed shop and the enforced exclusion of the unorganized workman, the privileges of the combination are more limited.

> *Tunstall* v. *Stearns*, 192 Fed., 808.
> *Davis Machine Co.* v. *Robinson*, 41 Misc. (N. Y.), 329.

The case of *Auburn Draying Co.* v. *Wardell* (*supra*) and not the case of *Bossert* v. *Dhuy*, 221 N. Y., 342, on which Judge Hough relied in dealing with the common law, is the New York decision most in point. The *Bossert* case is distinguishable on the following grounds:

(1) The *Bossert* case was limited to a combination of carpenters seeking to promote the sale of products made by affiliated carpenters, while in this case the defendants called upon the public generally to discontinue using presses made by the plaintiff and even sought to prevent their being exhibited to the public. In the *Bossert* case the Court says:

> "In the case now before us, if the defendants had called upon the public generally to discontinue using the plaintiff's material and had sought to prevent all persons by communications, written or otherwise, from dealing with the plaintiffs, their acts would have been illegal."

In the case at bar the defendants conducted a general boycott against the plaintiff's presses, even

to the point of preventing their public exhibition and advertisement through the National Exposition Company, when their stated object was to deprive the plaintiff of an opportunity of obtaining "a lot of orders" (fols. 332, 362-363). The printing trades, which have no direct interest in the building of presses, are called upon to aid in the conduct of this general boycott. The circular issued by defendant Keppler and President Johnson invites the Allied Printing Trades to influence their employers not to let contracts to the complainant (fols. 143-148). The circular of April 4, 1914, after referring to the complainant and another, requests the printing trades "to prevent the installation of this unfair machinery and also persuade, if possible, fair employers from letting further contracts for machinery to either of these firms" (fols. 150-154). The printing pressmen, referring to the complainant, passed resolutions to "use our influence to prevent the placing of orders for presses manufactured under unfair conditions" (fols. 195-200). Resolutions passed at the St. Louis Machinists' conference are of the same general character (fols. 163-164). A general circularization against the complainant was to be carried on (fol. 290), and it was generally sought to prevent sales (fols. 209, 288) by putting the company on the unfair list (fols. 290, 324).

(2) The case presents a malicious combination to injure the complainant within the meaning of the *Bossert* decision, for it extended beyond the activities of the machinists to other trades having no direct interest to subserve. As was said in the *Bossert* case:

> "An action for a direct and primary purpose in the interest of individuals or a combination of individuals, taken in good faith to advance the interest of the individuals or combination, may be lawful, while a remote and secondary action, which carries with it a degree of malice as a matter of law, is illegal."

Throughout the evidence it appears that the Machinists' Union carried on this boycott in conjunction with the pressmen and Allied Printing Trades, having no direct interest in the business of building presses, and since the machinists instigated this activity on the part of other trades and are members of the same conspiracy, their conduct must be judged by the tests applicable to the other trades. The machinists took up this boycott at the convention of the Pressmen's, Stereotypers' and Bookbinders' Unions (fol. 130), and the pressmen at least passed resolutions joining in the boycott against the complainant (fols. 195-200). These pressmen and printing trades had no interest in the controversy to justify their participation, and they are even barred from the work of erecting presses by the rules of the Machinists' Union (fols. 166-168, 215-222, 264-265). Neither do the teamsters have any direct interest, and the mere fact that they are affiliated with the Machinists' Union as a helpers' union does not create any solidarity of economic interest which the law can recognize. Malice at law is to be inferred from the hostile activities of these disinterested trades, as well as from the various statements of the defendants as to their intention to injure the complainant. Because of this malice, the defendants concentrated their attention upon the complainant at the exhibi-

tion, while permitting another non-union concern, the Oswego Machine Company, to exhibit (fol. 329).

This action of several different trades joining in a general appeal to the public to boycott the complainant, is a malicious combination within the meaning of the Bossert and Auburn Draying Company decisions.

(3) In the case at bar the defendants seek to induce breaches of contract and state themselves that they have prevailed upon many publishers to cancel orders (fol. 122). Their purpose in this respect was very clear in the case of the Exposition Company.

(4) In this case the defendants seek to prevent the hauling and transportation of presses within the City of New York by truckmen who are common carriers and not directly interested in the building of presses.

(5) The defendants also threaten to interfere with the operation of the presses by the pressmen (fols. 289-290), to prevent their being repaired (fols. 208-209), and to prevent their erection by either union or non-union men in the buildings (*Italian Herald* job). It is one thing to strike against non-union men being employed with union men in the erection of buildings, but it is quite another thing to strike against non-union men installing machinery or equipment which is no part of the construction work.

In applying the common law, Judge Hough also makes the mistake of deciding that the decisions of the Courts of New York State are controlling

as to the wrongfulness of such a combination under the common law. Such a question is one calling for independent decision by the Federal Courts.

B. & O. R. R. v. *Baugh*, 149 U. S., 368; 37 L. Ed., 772.

Burgess v. *Seligman*, 107 U. S., 33; 27 L. Ed., 359.

Smith v. *Alabama*, 124 U. S., 465; 31 L. Ed., 512.

The independence of the Federal Courts in such matters has been demonstrated on several occasions. Although the State Courts of Montana uphold the secondary boycott (*Pierce* v. *Stablemen's Union*, 103 Pac., 324), the Federal Court sitting in Montana reached a contrary conclusion (*Rocky Mt. Telephone Co.* v. *Montana Federation*, 156 Fed., 809); although the State Courts of California uphold the secondary boycott (*Parkinson* v. *Building Trades*, 98 Pac., 1027), the Federal Court sitting in that State held the contrary (*Loewe* v. *Cal. State Fed.*, 139 Fed., 71).

It is submitted that under the weight of authority of Federal and State decisions, the combination is illegal at common law.

POINT III.

The combination unlawfully seeks to prevent truckmen who are common carriers from performing their common law duty of serving those who purchase complainant's presses.

There can be no doubt that the Britton Trucking Company, which was engaged in a general trucking business employed "by different shops around town" (fol. 268), was a common carrier, even though its business was limited to the hauling of large machinery. (*Jackson Architectural Iron Works* v. *Hurlbut*, 158 N. Y., 34; 10 C. J., 49; *Heumann* v. *M. H. Bowers Co.*, 175 A. D., 627; 162 Supp., 590.) The fact that there is a combination among defendants to prevent truckmen as common carriers from hauling printing presses manufactured by the complainant, is beyond dispute. Deering says to the purchasers of complainant's presses: "Truckmen and helpers on these machine moving trucks are all now in the machinists' union, and they will not haul any machines. • • • You cannot haul out the machinery and it is no good to you on account of this strike at Battle Creek" (fols. 304-306). He told Britton, the truckman, "not to cart any Duplex presses and if I did there would be trouble" (fol. 271). He told Britton not to haul a press for Nicoletti Bros., "it would make trouble for me" (fol. 269), and Britton accordingly refused to haul the press because Deering "would haul the men off the job" (fol. 269). When Britton hauled the press for the *New York Law Journal* Deering "stopped the job" (fol. 270). "He told them to quit the job" (fol. 270). When

Britton carted the New York press for the *New York Law Journal* Deering knocked them off and Britton was obliged to finish the job with non-union men (fol. 272). Deering "knocked them off on two or three jobs" (fol. 274). The defendants, therefore, announced and carried out a comprehensive plan to prevent complainant's presses from being hauled by common carriers in New York City, and such a combination is clearly unlawful.

The common law duty of a common carrier to serve the public impartially is well recognized, and failure to perform that duty being a tort (*Pittsburgh Ry. Co.* v. *Morton*, 61 Ind., 539; *Michie on Carriers*, Sec. 381), the wrongfulness of the defendants' conduct in coercing a common carrier by strikes to commit such a tort is too clear for argument. This was the doctrine of the decision of Judge Taft in the case of *Toledo A. A. & N. P. Ry. Co.* v. *Penn. Co.* (*supra*), where an injunction was issued against the Railroad Brotherhoods to prevent them ordering strikes against any company which furnished the complainant with connecting facilities or received or handled the complainant's freight or cars. In that case Judge Taft said:

> "But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will and to withhold his labor as he will Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring or compelling others to commit an unlawful or

> criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. • • • Herein is found the difference between the act of the employees of the complainant company in combining to withhold the benefit of their labor from it and the act of the employees of the defendant companies (the connecting railroads) in combining to withhold their labor from them. That is the difference between the strike and the boycott."

In the case of *Thomas* v. *Cincinnati Ry. Co.* (*supra*), the American Railway Union had ordered a strike against railroads centering in Chicago if they hauled the cars of the Pullman Company where the men were out on strike, and Judge Taft held it to be unlawful.

POINT IV.

The combination unlawfully seeks to induce the complainant's customers to violate their contracts with the complainant.

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S., 229.

Dr. Miles Medical Co. v. *J. D. Park & Sons*, 220 U. S., 373.

Bitterman v. *Louisville & Nashville R. R. Co.*, 207 U. S., 205.

Angle v. *Chicago & St. Paul Co.*, 151 U. S., 2.

American Malting Co. v. *Keitel*, 209 Fed., 351.

At the time of the expositions the defendants stated again and again that the entire enterprise would be tied up by strikes unless certain written agreements with the complainant were canceled, and they even went so far as to consider an offer to defend the Exposition Company against any suit which might be brought by the complainant for such a breach of contract. Other customers of the complainant were also urged to cancel their written contracts, and there can be no question, under the law as now settled by the Supreme Court of the United States, that such conduct is unlawful and, in appropriate cases, may afford a proper case for protection by injunction.

The fact that there were existing contracts which this suit was designed to protect and did protect from the wrongful invasion of the defendants entitled the complainant to a decree.

In the case of *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U. S., 373, Mr. Justice Hughes says:

> "The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted."

The malice which it is essential to prove in such cases is not express malice, but "legal malice," and in none of the cases in our headnote was there any

express or wanton malice. In the case of *Medical Co.* the defendant was merely the interests of competition.

Upon all of the grounds set forth in it is urged that the judgment be reversed the complainant should be awarded prayed for in the complaint.

Respectfully submitted,

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of Dr. Miles
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in this brief
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ORT,
S MERRITT,
for Appellant.